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80-461

No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1979

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Petitioner,

v.

THE G. C. MURPHY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether an employer found to be monetarily liable to employees for establishing sex-based job classifications and pay scales in violation of Title VII of the Civil Rights Act of 1964 has a cause of action for contribution from a labor union that allegedly participated in the violations?

2. Whether the requirement of § 706(f)(1) of Title VII that suit may be brought only against a party named in an EEOC charge is satisfied with respect to an international union by a charge filed against one of its locals, when the international was afforded no notice of or opportunity to participate in the EEOC conciliation proceedings conducted pursuant to the charge, and was not named in the "right to sue" letter issued by the EEOC to the charging party?

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THE G. C. MURPHY COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Retail, Wholesale and Department Store Union, AFL-CIO, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on June 27, 1980.

OPINIONS BELOW

The original opinion of the district court is unreported, and is reprinted herein as *App.* F (66a-120a). The first opinion of the court of appeals is reported at 562 F.2d 880 (3rd Cir. 1977), and is reprinted herein as *App.* E (48a-65a). The second district court decision is reported at 23 F.E.P. Cases 83 (W.D. Pa. 1979), and is reprinted herein as *App.* D. (41a-47a). The second court of appeals decision —the decision from which certiorari is sought—is reported at .... F.2d ...., 23 F.E.P. Cases 86 (3rd Cir. 1980), and is reprinted as *App.* A (1a-37a).

JURISDICTION

The court below entered judgment on June 27, 1980, *App.* B (38a-39a). A timely petition for rehearing was denied on July 21, 1980, *App.* C (40a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 706, Civil Rights Act of 1964, Title VII, as amended 42 U.S.C. § 2000e-5, provides in pertinent part as follows:

> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referre dto as the "respondent") within ten days, and shall make an investigation thereof. . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . .
>
> (e) A charge under this section shall be filed within one hundred and eightly days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, . . .
>
> (f)(1) If within thirty days after a charge is filed

with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . .

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which amy include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. allowanble. No order of the court shall require the ad-

mission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT

The Relevant Events

On July 2, 1969, Joanne Glus, who was employed at a warehouse of G. C. Murphy Co. ("the Company"), filed a charge with the Equal Employment Opportunities Commission ("EEOC") against the Company alleging that she had been the victim of sex discrimination in her employment. On September 9, 1969, Glus filed an amended EEOC charge, naming "Retail, Wholesale and Department Store Union, Local No. 940, AFL-CIO" ("Local 940") as an additional respondent and alleging that "Local 940 supports" the Company's discrimination. *App.* 43a, 73a; Joint Appendix in Third Circuit, pp. 734a, 738a.

The EEOC found probable cause to believe that a violation had occurred, and initiated conciliation proceedings pursuant to § 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b). In those conciliation proceedings, monetary settlement proposals were exchanged,[1] but no agreement was reached. *App.* 45a.

The petitioner herein, Retail, Wholesale and Department Store Union (the International") is the international union with which Local 940 is affiliated. The International was not named as a respondent in the EEOC charges, nor did it

[1] The Company offered $50,000. The charging party sought $500,000. *App.* 45a.

receive notice that those charges had been filed. The International was not notified of nor aware of the conciliation proceedings, and perforce did not participate therein. *App.* 43a; 62a, n. 13; 74a.

When the concilation proceedings failed to produce a settlement, the EEOC issued a right-to-sue letter, pursuant to § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1), against the Company and Local 940; "no right to sue letter issued against the International." *App.* 43a, 74a.

Glus, together with other female employees of the Company's warehouse, thereupon instituted this action pursuant to Title VII and the Equal Pay Act.[2] Their complaint named as defendants not only the Company and Local 940, but also the International. (It also named as a defendant Teamsters Local 249 (hereinafter "Local 249"), which had recently won an NLRB election and succeeded Local 940 as the bargaining representative of the warehouse employees). The case was certified as a class action on behalf of all women employed in the warehouse. *App.* 2a, 53a.

The Company cross-claimed against each of the unions, alleging that the unions were solely responsible for the violations complained of and that if the Company were held liable for backpay it had a right to contribution from the unions. *App.* 2a.

Prior to trial, the Company entered into a settlement with the plaintiffs, agreeing to pay $100,000 to the plaintiff class for the Equal Pay Act violations, $448,000 for the Title VII violations, and $100,000 in attorney's fees. The settlement agreement provided that plaintiffs' action against the unions would be terminated, but that the Com-

[2] The original complaint alleged violations only of Title VII, but was later amended to allege violations of the Equal Pay Act as well. *App.* 67a.

pany reserved its right to pursue its course of action for contribution against the unions. *App.* 70a, 71a.

The First District Court Decision

After a trial on the contribution claim, the district court ruled, in pertinent part, as follows: (1) the Company cannot be awarded contribution for its Equal Pay Act violations, because Congress chose not to make unions liable for backpay under 29 U.S.C. § 216(b) (*App.* 103a-106a); (2) but federal courts do have the authority to award contribution to Title VII violators because "Title VII gave the federal district courts a full panoply of equitable powers," and an award of contribution would vindicate "the Act's goal of securing complete justice by whatever equity demands" (*App.* 111a, 113a); (3) even though not named in the EEOC charge the International can be held liable for contribution under Title VII;[3] (4) on the merits, the collective bargaining agreement between the Company and Local 940, which the International had participated in negotiating and had signed, violated Title VII (App. 82a-91a); and (5) one-half the Title VII backpay should be assessed against the unions, and judgment in favor of the Company against the International should be entered in the amount of $242,337 (*App.* 91a, 102a-103a, 120a).

The First Court of Appeals Decision

The International appealed the Title VII contribution award, and the Third Circuit reversed and remanded for

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[3] The district court expressed uncertainty as to whether the International had been named in the charge, and assumed *arguendo* that it had not been, *App.* 74a.

The charge named as respondents the Company and "Retail, Wholesale, and Department Store Union, Local 940, AFL-CIO."

further proceedings consistent with its opinion. *App.* 65a.[4] In its opinion, the Court rejected the district court's holding that the Company could obtain contribution from the International even if the plaintiffs had not perfected *their* right to sue the International under Title VII. In the Court's view, jurisdiction over the Company's contribution claim against the International existed only if jurisdiction had existed over Glus' action for backpay against the International, i.e. only if Glus' EEOC charge named the International or was otherwise sufficient to have conferred jurisdiction over a backpay claim against the International. *App.* 57a-61a. Noting that § 701(f)(1) authorizes suit only against "the respondent named in the charge," and declaring that "the requirements set forth in the 706(f)(1) of Title VII are jurisdictional," *App.* 57a, the Court remanded to permit the district court to decide (1) whether the International in fact had been named in Glus' charge (the Court noting that the district court had not decided this factual question) and (2) if not, whether Glus' charge against Local 940 sufficed to confer jurisdiction over Glus' claim for backpay against the International. *App.* 61a-65a. With respect to the latter question, the Court listed four factors which "the district court should look to":

The court reasoned that "[t]he designation 'AFL-CIO' in the amended charge could . . . refer to either Local 940 or the International." *App.* 74a.

[4] Local 940 also appealed the Title VII contribution award. It did not, however, challenge the district court's ruling that contribution can be awarded under Title VII; it challenged only the finding on the merits that contribution was appropriate on the facts. The Third Circuit affirmed. *Denicola v. G. C. Murphy Co.*, 562 F.2d 889, 892 (3rd Cir. 1977).

The Company appealed the district court's denial of contribution for monies paid under the Equal Pay Act. The Third Circuit affirmed both as to the International, *App.* 65a, and as to Local 940, *Denicola, supra*, 562 F.2d at 892-895.

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party. [*App.* 64a.]

The Court expressly refrained "at this time" from addressing "the other contentions raised by the parties." *App.* 65a.

The District Court's Decision on Remand

On remand, the district court found that "the International was not actually named in the charge before the EEOC." *App.* 43a. Nevertheless, "[b]ased on our conclusions regarding the four inquiries mandated by the remand, we find . . . that the plaintiff should not be held to strict compliance to the procedural requirement that the International be named in the charge before the EEOC." *App.* 42a. The court found, with respect to the first inquiry (Glus' knowledge of the role of the International) that Glus "knew of the International's involvement with the discriminatory acts alleged"—a finding which "suggests exclusion of the International as a defendant." *App.* 44a. But, the court concluded, the other three inquiries pointed the other way. With respect to the second inquiry ("similarity of interests") the International and Local 940 had "identical" interests, since their liability rested on the same ground: "acquiescence to discriminatory provisions of collective bargaining agreements with Murphy." *App.* 44a-45a. With

respect to the third inquiry ("actual prejudice"), the court, after acknowledging that the "question . . . is difficult to answer," *App.* 45a, reasoned as follows:

> The International argues that exclusion from conciliation is *eo ipso* actual prejudice. However, persuasive this argument may be, such a finding is inconsistent with the remand. In the usual EEOC case an unnamed party is excluded from conciliation. If we were to accept the argument of the International, actual prejudice would automatically be present, and no issue as to prejudice could ever arise as a matter of law.
>
> We consider the question of actual prejudice to require a finding whether, had the unnamed party been named and made a party to conciliation, conciliation could have been effective. This is, of course, a difficult finding to make, for the effect of another party on negotiations involves many subtle elements, and the judgments of many persons.
>
> Despite problems attendant to the issue, it is probable that even if the International had been a party to conciliation, settlement would not have been reached. [*App.* 45a-46a.]

Finally, with respect to the fourth inquiry (whether there were "representations of the International to plaintiffs that [the Local] would represent the International"), the court found "no direct statement by any International representative that the International was to be represented by Local 940 for purposes of plaintiffs' complaints" but found that "[t]he nature of the relationship between the International and Local was such that a member of the Local could have concluded that a charge against the Local would also include the International." *App.* 46a. In the court's view, this was the equivalent of a direct representation within the intendment of the Court of Appeals' fourth inquiry. *Id.*

The court then addressed the question whether these findings sufficed to confer jurisdiction over the backpay claim against the International. Reasoning that the first and fourth inquiries both were addressed to the same question—whether the failure to name the International was "excusable"—the court concluded that satisfying either one would confer jurisdiction despite the absence of a charge against the International. *App.* 46a-47a. Accordingly, the court reinstated the judgment.

The Court of Appeals' Second Decision (The Decision From Which Certiorari Is Now Sought)

The International appealed. The Court of Appeals affirmed by a 2-1 vote (Higginbotham, J., joined by Gibbons, J.; Sloviter, J., dissenting).

The majority opinion first addressed the issue which had been remanded by its prior decision: the existence of jurisdiction over the contribution claim against the International. Declaring that its "four-prong test is not a mechanical one; no single factor is decisive," *App.* 4a, the majority agreed with the district court that in the circumstances as found on remand, Glus' naming Local 940 in the charge sufficed to confer jurisdiction over the International. *App.* 4a-5a.[5]

Having satisfied itself that there was jurisdiction over the Company's contribution claim, the Court of Appeals

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[5] The Court declined to decide the Company's alternative claim, advanced for the first time on the second appeal—that even if jurisdiction were lacking under Title VII it could be premised on 28 U.S.C. § 1331—"because jurisdiction exists under Title VII and because [the Company] failed to plead section 1331 as a jurisdictional base." *App.* 5a, n. 1.

turned to the substantive question whether defendants in Title VII actions can obtain contribution and held

> that a federal common law right of contribution exists when a defendant charged with a violation of Title VII settles with a plaintiff prior to trial for the full amount of damages and requests contribution from a non-settling co-defendant who is jointly liable. [*App.* 14a.]

The lower court recognized that "[b]y its express terms Title VII does not provide for a right of contribution," *App.* 5a, and that the legislative history contains no evidence of Congressional consideration of contribution claims, *App.* 12a. This silence "reflects the probability that contribution, although of considerable importance, was not contemplated by the drafters of the legislation." *App.* 8a.

But, that court declared, "fundamental fairness demands a sharing of the liability," *App.* 6a, and it is the "responsibility of federal courts to define the body of federal common law which arises from the interstices of federal law," *App.* 8a. The majority below noted its "disagreement with the International and the dissent that no right of contribution exists in the federal common law because there is an 'established rule that contribution would not be implied in the absence of a statutory provision'," *App.* 6a.

The lower court acknowledged that a "scholarly debate . . . rages" about "the power of the federal courts to recognize common law claims . . . and the extent to which it can be exercised." *App.* 8a.

> Yet, in spite of the stridency of the debate, two principles firmly and resolutely emerge. First, there is a federal common law . . . Second, in some circumstances federal common law causes of action arise from the interstices of congressional acts. [*App.* 8a.]

The majority below reasoned that, as "the litigants before us have tendered the issue . . . we must make a choice"

between rejecting or adopting a contribution rule, and it disputed the dissent's assertion that in making that "policy choice" it was performing a legislative, rather than judicial, function:

> The dissent argues that by choosing, in this case, the rule of decision which we believe the better one we are unjustifiably performing a legislative function. . . . The dissent's complaint is that . . . we are invading the exclusive preserve of Congress. If we were to announce a federal rule of decision implied from a constitutional provision, and thus arguably beyond the future control of Congress there might be some merit to the dissent. . . . But the rule of decision which we have found to be preferable could be changed by Congress tomorrow.
>
> • • • •
>
> There are countervailing arguments, and the policy choice is a difficult one. But the litigants before us have tendered the issue, and its closeness does not absolve us from the obligation to decide it. Nor does our action become an impermissible encroachment on the legislative branch, merely because of the difficulty of the issue presented. Whether we reject or adopt a contribution rule we must make a choice.
>
> If we were to be convinced that a rule prohibiting contribution better served the purpose of Title VII our adoption of that rule would stand in relationship to Congress on exactly the same footing. The logic of the argument that adoption of a rule prohibiting rather than permitting contribution would be less legislative escapes us. Certainly the party whose claim for contribution was rejected would not think we acted any less legislatively in rejecting it. Reliance on deference to the legislative process cannot conceal the fact that the dissent has made such a choice. [*App.* 14a-16a.]

The Court's "policy choice" was to adopt a rule of contribution as a matter of "federal common law," because in the Court's view that rule would effectuate the purposes of Title VII in several ways: (1) it would achieve the apportionment of liability which Congress expressly contemplated could result at the end of a con-

tested Title VII action in which both employer and union were sued by the plaintiffs; (2) it would enhance Title VII's "prophylactic" purpose by making clear to all wrongdoers that they cannot escape backpay for their wrongs by the fortuity of "the employee's predilections as to whom to sue"; and (3) it would "serve the Title VII policy of favoring conciliation and settlement" by assuring a wrongdoer that settlement would permit subsequent claims for contribution against other wrongdoers. *App.* 12a-13a.[6]

Judge Sloviter's Dissent

Judge Sloviter dissented from the majority's holding that contribution can be awarded in Title VII cases, declaring that the majority's ruling "assumes unto the judiciary the authority to make a federal common law of contribution for a claim arising out of a federal statute which does not expressly provide for contribution, does not imply that contribution is authorized, and does not require contribution for the effectuation of its purposes." *App.* 20a.

Judge Sloviter agreed that there is a "federal common law," but saw its sweep as much narrower than the majority supposed. She believed that courts exercise such "lawmaking power" (*App.* 20a) only in limited instances:

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[6] The Court acknowledged in a footnote that "some critics" believe that "contribution in fact serves to restrict settlements" because "a . . . defendant may be fearful of settling and being held liable in contribution for a portion of an award assessed against a co-defendant who went to trial," but responded:

> We do not agree that the potential for this problem should destroy the right altogether. That problem has been dealt with by courts who have been faced with requests for contribution involving settlements in other areas of the law. *See, e.g.*, McLean v. Alexander, 449 F.Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3rd Cir. 1979) (securities law). [*App.* 14a, n. 2.]

those "where the federal courts have been given exclusive jurisdiction by the Constitution, but where Congress has not legislated to supply a rule of law" (principally disputes between states, maritime cases, and causes of action directly on the Constitution), *App.* 21a; those involving the rights and duties of the United States, *App.* 23a; those involving relations with foreign nations, *App.* 23a; and those where "federal common law must be created or determined because a federal statute supplies federal jurisdiction but does not supply the substantive rule of law (a category which consists principally, if not exclusively, of Section 301 of the LMRA, 29 U.S.C. §185, see *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448 (1957)), *App.* 24a.

Judge Sloviter thought the majority to be in error in perceiving the decisions which imply private causes of action for damages for violations of federal statues to be instances of "lawmaking," *viz.* of judicial articulation of "federal common law." In her view, these are simply examples of statutory interpretation:

> [T]here is no need to make law, as such. . . . The judicial function is simply the ascertainment of legislative intent. . . . Indeed, some policy analysis is needed but it is policy analysis in the context of articulated legislative action. [*App.* 26a.]

Similarly, in "filling in statutory interstices" with respect to statutes regulating private parties, the courts are not fashioning a "federal common law," but implementing the will of Congress:

> [I]t would be imparting too much to the Court's interpretive function to view the process as one of lawmaking. It is impossible for the legislature to anticipate every possible issue of interpretation that may arise in the application of a statutory scheme, and hence it is inevitable that there will be unintended gaps in legislation. . . . The nature and importance of the

> gaps may vary. But the touchstone of judicial responsibility in dealing with such stautory gaps is to ascertain, to the best extent possible, the Congressional intent, and to interpret the statute in light of the statutory scheme. There is a fixed reference point — the statutory provision, other language in the statute, and the legislative intent—which delimits the parameter of judicial action. [*App.* 27a.]

In Judge Sloviter's view, therefore, there is no room for judicial authority to create a cause of action for contribution as a matter of "federal common law." Such a cause of action exists only if Congress *intended* that it exist. Absent such intent, the matter is simply one about which Congress has not legislated, and it is not the courts' province to initiate such legislation. *App.* 28a-31a.

In the case of Title VII, Judge Sloviter concluded, it could affirmatively be said that Congress did *not* intend to create a right of contribution:

> Turning to the statute at hand, it is questionable whether there even exists in Title VII of the Civil Rights Act of 1964 the statutory interstice found by the majority. The statute establishes a comprehensive program designed to eliminate discrimination of the type specifically addressed. It establishes the rule of law, administrative agency enforcement, private rights of action, and specified procedures which must be followed. It can operate effectively, and indeed has operated effectively since its enactment, without a right of contribution by one defendant against another defendant. . . .
>
> Even if we were to apply the statutory interpretive rules used when there are, in fact, interstices, they do not lead to the implication of a right of contribution in Title VII. Congress, at the time of its enactment, was well aware that the traditional rule applicable in federal courts was that no right of contribution existed. This had been established by the Supreme Court when it said, "In the absence of legislation, courts exercising a common law jurisdiction have generally held that they cannot on their initiative create an enforceable

> right of the contributing among joint tortfeasors." *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1951) [7]. . . .
>
> The rule of no contribution in antitrust actions has been consistently followed by the federal courts, with but one recent exception. [Citing cases]
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>
> Congress was not unaware that, in order to provide for contribution in a claim based on a federal statute, it must make explicit provision for such in the statute itself. That is precisely what Congress did in the Securities Act of 1933. . . . 15 U.S.C. § 77k(f) (1976). Provisions for contribution similar to this also appear in the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 78i(e), 78r(b) (1976). Whatever force there may be in the argument that the subsequent enactment of a specific statutory provision in the Securities statutes cannot shed light on Congressional intent as to the antitrust laws, enacted more than two decades earlier, it is inapplicable to Title VII which was itself enacted substantially after Congress framed the specific provisions for contribution in the Securities Laws.
>
> . . . One can assume in the absence of contrary indication, that when it enacted Title VII Congress both was aware of and relied on the established rule that contribution would not be implied in the absence of a statutory provision. [*App.* 31a-34a, footnotes omitted.]

Judge Sloviter's conviction that Congress did not intend, in enacting Title VII, to create a cause of action for contribution, was confirmed by two additional considerations:

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[7] Judge Sloviter did not regard the subsequent decision in *Copper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), to have "in any way" undercut this central message of *Halcyon:*

> In *Cooper*, the court was applying the well-established maritime rule allowing contribution between joint tortfeasors. *Id.* at 106. *Cooper* belongs to that category of maritime and admiralty cases where the Court is free to make law or, as it did there, follow well-established precedent. [*App.* 32a.]

First, there are innumerable legislative judgments which must be made in creating a right to contribution.

> For example, if contribution is to be implied, should it be equal contribution or should it be based on proportionate fault? Should responsibility be allocated in some fashion among intentional and unintentional joint tortfeasors . . . ? Should the settling defendant be protected from liability for contribution to later sued defendants? [*App.* 34a.]

Because these issues are "on their face, hardly suitable for judicial determination," *id.*, it is unlikely that Congress would have intended a right of contribution without providing guideposts for their resolution.

Second, not only is contribution not *necessary* to the fulfillment of Title VII's purposes, it is possible that contribution would be *detrimental* to those purposes:

> It might deter settlement if a settling defendant would remain liable to nonsettling defendants for contribution, since it would preclude the most meaningful characteristic of settlement: final and complete termination of involvement in the case. . . . On the other hand, a rule against contribution might very well encourage deterrence because potential violations would be more likely to refrain from violations if they knew that any injured party could impose the full burden of recovery on any one of them even though it played only a relatively minor part in the activity. . . . [*App.* 36a.]

Because "the arguments as to the effect of a rule of contribution are inconclusive" and "may cut either way," they involve "policy judgments and considerations, which Congress should evaluate and adjust," *App.* 36a. It is "lawmaking as a naked exercise of power" for the courts "to weigh the competing policy considerations and to make an essentially legislative judgment . . . without the benefit of the various competing interests which, by design, appropriately occurs within the legislative arena . . ." *App.* 37a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE SQUARELY PRESENTS A QUESTION—WHETHER THERE IS A TITLE VII RIGHT OF CONTRIBUTION—WHICH IS RELATED TO AND SHOULD BE HEARD WITH THE EQUAL PAY ACT CONTRIBUTION QUESTION ACCEPTED FOR DECISION IN THE *NORTHWEST AIRLINES* CASE (NO. 79-1056) AND THE ANTITRUST CONTRIBUTION QUESTION OF THE *WESTVACO* CASE (NO. 79-972).

It is manifest that the question whether an employer found to have violated Title VII may obtain contribution from a labor union is one that should be decided by this Court. The Court has so recognized by granting *certiorari* in *Northwest Airlines, Inc.* v. *Transport Workers Union*, No. 79-1056, where the second question presented is:

> Whether an employer has a right to contribution from a labor union that is directly liable to employees for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, for participating in a discriminatory collective bargaining agreement. [Petition For A Writ Of Certiorari, No. 79-1056, p. 2.]

Indeed, the authority of the federal courts to award contribution is an issue of pressing importance in a number of federal statutory contexts. The first question presented in *Northwest Airlines* is the validity of a suit for contribution under the Equal Pay Act. And this Court has of course also granted *certiorari* to determine whether an action for contribution lies among joint violators of the federal antitrust laws. *Westvaco Corp.* v. *Adams Extract Co.*, No. 79-972.[8] Moreover, as the dialogue between the

[8] The law in the courts of appeals is in disarry. *Contrast, Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897, 902-03 (5th Cir. 1979) ***petition for cert. pending sub nom. Texas***

majority and dissenter below (the essence of which we set out at pp. 8-16 *supra*) demonstrates, the analytic problems attendant to answering the question whether contribution is available (and if so under what circumstances) are formidable.

There is no area in which prompt resolution of the contribution issue is more important than Title VII. More than 5,000 employment discrimination suits are filed *each year* in the federal courts. Administrative Office of the U.S. Courts, *1979 Annual Report of the Director*, Table 30, p. 71 (1979). In the vast majority of cases in which violations are found, the standards announced in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415, 417-422 (1975) require that backpay and attorney's fees be awarded. Because so many workforces are unionized, there are frequently two potential defendants: the employer and the union. And because employees do not always sue both, and, even when they do, one defendant may settle without the other, questions of contribution frequently arise.

Thus, on every count the Title VII contribution issue is one uniquely requiring decision by this Court. However, *Northwest Airlines* does *not* squarely raise the Title VII

Industries, Inc. v. *Radcliff Materials, Inc.* No. 79-1144 (filed Jan. 24, 1980) (48 U.S.L.W. 3579) *and Olson Farms* v. *Safeway Stores*, [1979] 2 Trade Cas. (CCH) ¶ 62,995 (10th Cir. 1979), *with Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979).

The district courts similarly are divided. *Contrast Younger* v. *Glamorgan Pipe & Foundry Co.*, 418 F.Supp. 743, 796-97 (W.D. Va. 1976) (Widener, J.), *vacated and remanded on other grounds*, 561 F.2d 563 (4th Cir. 1977), and *Harden* v. *Illinois Bell Tell. Co.*, No. 74 C 1505 (N.D. Ill. 1975), *with Northwest Airlines* v. *Transport Workers Union*, 20 FEP Cases 969 (D.D.C. 1977), *affirmed in part and vacated in part on other grounds*, 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted*, No. 79-1056, and cases cited therein.

contribution question. In that case, the employer initiated an independent lawsuit against two unions, seeking contribution to a judgment entered against the employer under the Equal Pay Act and Title VII. The district court dismissed the claim for contribution under the Equal Pay Act, holding that Congress' failure to authorize employer damage suits against unions precluded employer contribution against unions. But the district court denied the motions to dismiss the claim for contribution under Title VII, concluding that in appropriate circumstances contribution is available under Title VII. The district court entered partial judgment under Rule 54(b) on the Equal Pay Act claim, and certified it sruling on the Title VII claim for interlocutory appeal.

The D.C. Circuit affirmed the Equal Pay Act ruling, *but did not reach or decide the Title VII issue.* The unions having raised a laches claim for the first time on appeal, and the EEOC having filed an *amicus curiae* brief supporting that claim, the Court "decline[d] to resolve a complex and sensitive question when the claim which forms the basis for the appeal may suffer from some other defect" (606 F.2d at 1356). Its disposition was as follows:

> Accordingly, we remand that portion of the district court's order which grants contribution or indemnification under Title VII and instruct the trial court to make a determination on the laches question. If the trial court finds that laches is not a bar, the defendants' appeal may be renewed. [*Id.* at 1356.]

With the case in this posture, Northwest filed the petition for *certiorari* which this Court granted. The Equal Pay Act issue is, of course, squarely presented in *Northwest*, but the ruling on that issue may not resolve the Title VII issue (because the Equal Pay Act is different from Title VII in that employees are not entitled under the former to sue

unions for damages). And this Court may well not reach the Title VII issue, for it may conclude either to affirm the Court of Appeals' disposition (deciding nothing, and remanding for consideration of the laches claim), or hold that laches bars contribution claims and thus remand without reaching the broader issue.

By contrast, the issue whether contribution can be obtained under Title VII unquestionably is presented in the instant case, and it is presented in the context of a fully-litigated record rather than a motion to dismiss. Accordingly, we urge the Court to grant certiorari and set this case for argument with the *Westvaco* and *Northwest* cases.[9]

II. THE RULING BELOW AS TO WHETHER NAMING A LOCAL UNION IN AN EEOC CHARGE IS SUFFICIENT TO OPEN ITS INTERNATIONAL UNION TO SUIT UNDER TITLE VII IS IN SQUARE CONFLICT WITH A DECISION OF THE SEVENTH CIRCUIT AND INVOLVES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW.

This case also presents a second major question—one which happens in this instance to arise in a contribution context but has far broader ramifications.[10] Section 706(f)

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[9] In order to facilitate the latter, we have moved to expedite the consideration of this petition, and have signified therein our willigness to abide by an accelerated briefing schedule.

[10] The court below found the requirement of § 706(f)(1) described in the text to be a "jurisdictional prerequisite" to a Title VII suit (*App.* 57a), and ruled that a suit for contribution would not lie against a party whom the plaintiff could not sue for failure to satisfy this "prerequisite." The Company's ability to sue the International was thus dependent upon whether plaintiffs had satisfied § 706(f)(1) with respect to the International. The issue whether naming the Local in the EEOC charge is sufficient to support a suit against the International is accordingly the same as if it had arisen directly in a Title VII action rather than in a secondary action for contribution.

(1) of Title VII permits suit only against "the respondent named in the [plaintiff's prior EEOC] charge." As this case shows, frequently persons alleging Title VII violations file an EEOC charge naming a local union as respondent, and then later attempt to sue both the local and the international union with which the local is affiliated. The Courts of Appeals are in square conflict as to whether, and if so in what circumstances, an international can be sued on the basis of a charge against a local.

The court below has held that an international can be sued even though it was not named in the EEOC charge, had no notice of the charge, and was neither notified of nor afforded an opportunity to participate in the administrative proceedings on the charge. It is sufficient, in the opinion of that court, that the charging party's failure to name the international did not reflect a deliberate decision to exonerate the international, that the international's alleged wrong was similar to the local's, and that more likely than not the international suffered no "actual prejudice" by reason of its exclusion from the administrative process (on the theory that the international might not have supplemented the company's monetary offer by enough to have caused a settlement in the conciliation proceedings).

The decision below is in square conflict with the Seventh Circuit's decision in *Le Beau* v. *Libbey-Owens-Ford Co.*, 484 F.2d 798 (7th Cir. 1973), where the Court would not permit suit against the international on the basis of charges against the local:

> None of the complainants before the EEOC named the International Union as a respondent and that Union never appeared or participated before the Commission. Title VII employment discrimination suits are permitted only "against the respondent named in the charge" before the EEOC. 42 U.S.C. § 2000e-5(f)(1).

> This policy decision is based on the Congressional purpose of encouraging conciliation and voluntary settlement of disputes and is supported by a long line of authority. [*Id.* at 799.]

See also *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974) (permitting joinder of non-charged international only as a Rule 19 defendant necessary for relief).[11] The Fifth Circuit, declaring the issue "important," has noted the conflict. *Guerra* v. *Manchester Terminal Corp.*, 489 F.2d 641, 647 n. 6 (5th Cir. 1974). Not surprisingly, in light of the disagreement among the Circuits, the decisions of the district courts are divided.[12]

The decision below, moreover, is, we believe, unsound. The purpose of the charge-filing requirement, and of the

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[11] It should be emphasized that this is not a case in which the international, although not named in the charge, received timely notice of the charge and participated fully in the EEOC proceedings. The Ninth Circuit has held that such notice and actual participation fulfills the purpose of the charge-filing requirement, and thus permits suit against the international as if it had been formally named in the charge. *Gibson* v. *Local 40, Supercargoes & Checkers, etc.*, 543 F.2d 1259, 1263 n. 1 (9th Cir. 1976).

[12] "The district courts have divided sharply on the issue." *Stevenson* v. *International Paper Co.*, 432 F.Supp. 390, 397 (W.D. La. 1977). Several have ruled that a charge against a local cannot support jurisdiction of a suit alleging violations by an international. See, e.g., *Jamison* v. *Olga Coal Co.*, 335 F.Supp. 454, 460-461 (S.D. W.Va. 1971); *Donnell* v. *General Motors Corp.*, 15 FEP Cases 242, 244 (E.D. Mo. 1977); *Holiday* v. *Red Ball Motor Freight, Inc.*, 399 F.Supp. 81 (S.D. Tex. 1974). Others have held that an exception is permitted *only* if the international had actual notice of the charge and was afforded an opportunity to participate in the administrative proceedings. *Stevenson, supra*, 432 F.Supp. at 397-398; *Back* v. *Bakery & Confectionery Workers*, 16 FEP Cases 120, 123 (S.D. Ohio, 1977); *Ruckel* v. *Essex International, Inc.*, 14 FEP Cases 403, 405-406 n. 2 (N.D. Ind. 1976). One court has followed the Third Circuit's "four-prong" *Glus* standard.

limitation of suit to those against whom charges were filed, is to implement "the Congressional purpose of encouraging conciliation and voluntary settlement of disputes" through the EEOC pre-suit conciliation procedures. *Le Beau, supra.* That purpose is undermined by permitting suit against the International in this case. That the victim's failure to name the International was somehow "excusable" (*App.* 47a.)—even if that were true here, and it is not [13]—is beside the point, as is the similarity of the wrongs allegedly committed by the Local and the International. The purpose of conciliation is not to determine guilt, but to see if a settlement can be reached. While the Local, in asserting its own innocence, might coincidentally be asserting the innocence of the International as well, the Local's failure (indeed, in this case financial inability, *App.* 72a) to offer any significant amount of money toward

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Williams v. *Southern Bell Tell. & Tell Co.*, 464 F.Supp. 367 (S.D. Fla. 1979). Others have adopted different rationales for exceptions, based upon agency principles, affinity between local and international, degree of joint complicity in the violations alleged, etc. See, e.g., *Cook* v. *Mountain States Telephone & Telegraph Co.*, 397 F.Supp. 1217, 1224-25 (D. Ariz., 1975); *Tippett* v. *Liggett & Myers Tobacco Co.*, 11 FEP Cases 1290, 1292 (M.D.N.C. 1973). See also *Sokolowski* v. *Swith and Co.*, 286 F.Supp. 775, 782 (D. Minn. 1968); *Butler* v. *Local No. 4, Laborers Int'l. Union*, 308 F.Supp. 528, 530-531 (N.D. Ill. 1969).

Underlying the conflict, as the opinions reflect, are disagreements on two points: (1) whether § 706(f)(1) is truly "jurisdictional," or whether it merely reflects policy considerations which can be outweighed in particular cases by countervailing policy considerations; and (2) whether the purpose of § 706 (f)(1) is to protect the prospective *defendant*, the prospective *plaintiff*, or the *EEOC*.

[13] In its first opinion, the court below identified two factors as indicia of such "excusability": that the charging party was unaware of the international's participation in the wrongs, and/or that the international had designated the local as its agent to de-

settlement is no indication whatever of what the International might have offered had it been aware of the charge and a participant in the conciliation proceedings. And the court's conclusion that the International suffered no "actual prejudice"—i.e. that settlement "probably" would not have been reached even had the International participated in the conciliation proceedings—is, as it acknowledged, the sheerest speculation, a finding "difficult to make" (*App.* 45a). Thus, the district court speculated that the International might have offered $50,000 to settle, but surmised that the charging party, having rejected the $50,000 would have rejected a combined Company-International $100,000 settlement offer as well. *Id.* That conclusion hardly follows.

In view of the frequency with which the issue arises, and the square conflict among the lower courts, this Court should decide whether, and if so in what circumstances, an international union may be sued under Title VII although only an affiliated local was named in the EEOC charge.

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fend it against charges of wrongdoing (*App.* 64a) .On remand, the district court found both absent: the charging party knew of the International's participation, and had not been told that the International had designated the Local as its agent to defend against her charges (*App.* 44a, 46a). The district court however, found excusability on yet a third basis: that "the nature of the relationship was such that a member of the Local could have concluded that a charge against the Local would also include the International" (*App.* 46a). The court of appeals found this sufficient, but without explaining why (*App.* 4a, 5a).

CONCLUSION

For the reasons set forth hereinabove, certiorari should be granted, and this case should be set for argument in tandem with *Westvaco Corp.* v. *Adams Extract Co.*, No. 79-972 and *Northwest Airlines, Inc.* v. *Transport Workers Union*, No. 79-1056.

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APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 79-1507 and 79-1508

JOANNE GLUS, KATHLEEN SWANSON, LOUISE ZYLA, CONSTANCE SIMM, MARY A. GEISSLER, LOIS ANN PODBESEK, JOAN E. HORNFECK, MAXINE BRAY, JOANNE L. ROMESBURG, MARY KAHLER, STELLA WALNY, CARLENE M. FALCO, BERNICE M. SHRUM, SANDRA K. EVANS, ROSE MARIE ADAMCIK, ALICIA A. UKASIK, KAREN L. ROSSASON, VIRGINIA ANDERSON, DONNA CRAIG

v.

THE G. C. MURPHY COMPANY, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 940 AND INTERNATIONAL UNION OF WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO

G. C. MURPHY COMPANY,
Appellant in No. 79-1508

INTERNATIONAL UNION OF WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,
Appellant in No. 79-1507

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. CIVIL No. 71-0261)

Argued November 15, 1979 Before
GIBBONS, HIGGINBOTHAM AND SLOVITER,
Circuit Judges

Filed June 27, 1980

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

The International Union of Wholesale and Department Store Union, AFL-CIO (the International) appeals for a second time from an order of the district court which holds it liable in contribution to The G. C. Murphy Company (Murphy) for violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000g (Title VII). Murphy cross-appeals challenging the district court's calculations of the International's liability. We agree with the district court that Murphy has a right of contribution. We will affirm.

I.

These appeals arise out of a class action brought in 1971 on behalf of all females employed by The G. C. Murphy Company from July 1965 to January 1971. The plaintiffs in that action named as defendants Murphy; the International; the Retail Wholesale and Department Store Union, Local 940 (Local 940); and Teamster's Local 249 (Local 249), the successor collective-bargaining agent of Local 940. They alleged, *inter alia,* that Murphy and the unions had violated Title VII and the Equal Pay Act of 1963, 29 U.S.C. § 206, by agreeing to and maintaining a collective-bargaining agreement that provided for separate job classifications, pay scales, and seniority systems for male and female employees.

After the filing of answers, Murphy filed a cross-claim against the unions in which it asserted that the unions were solely liable for the discrimination complained of and that if Murphy was found liable, it had a right of contribution against the unions. Prior to trial a settlement was reached by Murphy and the plaintiff class. The settlement was approved by the district court. It provided for the payment of $548,000 in damages and $100,000 in attorneys' fees. The payment was to be made in three installments with six percent interest on the deferred payments; $100,-

000 of the $548,000 was allocated to the Equal Pay Act charge.

Murphy continued to press for contribution from the unions and eventually settled with Local 940 for $4,146, the total amount in Local 940's treasury. Trial proceeded on Murphy's claim against the International and Local 249. The district court concluded that Murphy and the defendant unions had violated Title VII and that they were equally liable for the discrimination and thus equally responsible for the financial loss of the plaintiffs. After dividing the damages, the court entered judgment against the International in the amount of $242,337. *Glus v. G. C. Murphy Co.*, Civ. No. 71-264 (W.D.Pa. Apr. 29, 1976), *reprinted in* Joint Appendix at 124a-78a [hereafter *Glus I*].

The International appealed from that judgment asserting that the district court did not have jurisdiction over it under Title VII because the International had not been named in the complaint filed by the plaintiffs with the Equal Employment Opportunity Commission (EEOC). It also asserted that no right of contribution could be claimed for violations of Title VII or the Equal Pay Act. In the first appeal we held that Murphy had no right of contribution under the Equal Pay Act, *Denicola v. G. C. Murphy Co.*, 562 F.2d 889 (3d Cir. 1977), but remanded for further proceedings on the issue of whether the district court had jurisdiction under Title VII. *Glus v. G. C. Murphy Co.*, 562 F.2d 880 (3d Cir. 1977). On remand the district court found that the plaintiff had not named the International in the EEOC complaint but that the omission did not result in an absence of jurisdiction. *Glus v. G. C. Murphy Co.*, Civ. No. 71-264 (W.D. Pa. Feb. 14, 1979), *reprinted in* Joint Appendix at 833a-40a [hereinafter *Glus II*]. The International appeals for a second time challenging the district court's conclusions on jurisdiction and challenging the district court's earlier decision on the right of contribution. Murphy cross-appeals arguing that the district court did not properly calculate the amount due under the right of contribution.

II. *Title VII Jurisdiction*

In the first appeal we enumerated four factors that should be considered in determining whether the district court had jurisdiction under Title VII. They were:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named [party] are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

562 F.2d at 888. This four-prong test is not a mechanical one; no single factor is decisive. Instead each factor should be evaluated in light of the statutory purposes of Title VII and the interests of both parties. The district court applied these factors and concluded that it had jurisdiction. We agree.

The interests of Local 940, which was named in the EEOC complaint, and the International are identical in all significant aspects, and thus the International was not harmed by its absence from the EEOC proceedings. Their liability arises from their participation in the same collective-bargaining agreements. The International was the sole union signatory to the collective-bargaining agreement for a portion of the period where discrimination was found to have taken place; later both the International and Local 940 signed the agreements. The International's representative was the chief union negotiator at many of the negotiation sessions. The International's interests were vigorously litigated by Local 940 at the EEOC proceedings. Local 940 stood firm in its denial of liability. Further, both the International and Local 940 were represented by the same attorney, Emil E. Narick, Esq., in the district court proceeding until Murphy filed its claim for contribution.

The plaintiffs' interests were not harmed by the International's absence in the EEOC process. If a settlement had been reached during the EEOC proceeding, complete relief could have been obtained from the defendants then present. We also note the finding of the district court that the close relationship between the International and Local 940 could have led the plaintiff to reasonably assume that the interests of both unions were to be represented by Local 940. *Glus II*, App., at 838a-39a. Finally, we agree with the district court that the conciliation process was not rendered less effective because of the absence of the International. The settlement agreement was not reached until the federal court action had begun, at which time the International was a party to the litigation.

We will therefore affirm the district court's decision on the jurisdictional issue.[1]

III. *Right to Contribution*

In its cross-claim Murphy requested contribution for what it asserted was the International's share of the damages Murphy had paid in the settlement agreement. By its express terms Title VII does not provide for a right of contribution. Murphy asserts that nevertheless a right of

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[1] For the first time Murphy argues that even if the district court erred by concluding that it had jurisdiction under Title VII we should hold that the district court had jurisdiction because Murphy's claim sounds in federal common law and thus an independent basis for jurisdiction exists in 28 U.S.C. § 1331. As our discussion below indicates, we agree that Murphy's right to contribution arises from the federal common law. As such section 1331 might have provided the basis for jurisdiction. *See* Illinois v. Milwaukee, 406 U.S. 91, 98-102 (1972). *But see* Northwest Airlines, Inc. v. Transport Workers Union of America, 606 F.2d 1350, 1356 (D.C. 1979), *petition for cert. filed*, 48 U.S.L.W. 3453 (Jan. 16, 1980) (court's jurisdiction over right of contribution for Title VII claim may depend on timeliness of the suit). We do not decide that issue because jurisdiction exists under Title VII and because Murphy failed to plead section 1331 as a jurisdictional base.

contribution exists in the federal common law arising from Title VII. It is to this claim that we now turn.

A.

At the outset we note our disagreement with the International and the dissent that no right of contribution exists in the federal common law because there is an "established rule that contribution would not be implied in the absence of a statutory provision." Typescript Opinion at 39. Initially most American courts held that there was no right of contribution under the common law, relying on the English decision *Merryweather v. Nixan*, 8 Term R. 186, 101 Eng.Rep. 1337 (K.B. 1799). *See, e.g., Union Stock Yards Co. v. Chicago, Burlington, & Quincy Railroad Co.*, 196 U.S. 217 (1905). This prohibition resulted from the belief that a wrongdoer should not be able to shift the responsibility of his actions to the shoulders of another. The rule prohibiting contribution has come into disrepute. It is now widely recognized that fundamental fairness demands a sharing of the liability. Without a right of contribution a wrongdoer may escape liability for his actions because of the happenstance of the plaintiff's choice of defendants. *See* Prosser, *The Law of Torts*, § 50 (4th ed. 1971). *See also* Sellers, *Contribution in Antitrust Damage Actions*, 24 Vill.L.Rev. 829, 855-63 (1979) (reviewing state law on contribution). The vast majority of the states have now rejected the prohibition either by statute, *e.g.*, Del. Code tit. 10, §§ 6301-08; Pa. Cons. Stat. Ann. tit. 42 §§ 8323-27 (Purdon 1979), or by judicial action. *E.g., Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949); *State Farm Auto Insurance Co. v. Continental Casualty Co.*, 264 Wis. 493, 59 N.W.2d 425 (1953).

The International argues that the prohibition still exists in federal law, relying on *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952). *Cf. Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979 — 2 Trade Cases ¶ 62,995 (10th Cir. 1979) (relying on *Halcyon Lines* to deny contribution under federal anti-trust laws). We do not agree. *Halcyon Lines* was an action for contribution arising

under the admiralty jurisdiction of the federal courts. The Court found the claim inconsistent with the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-944. It denied the claim and stated, "[I]n the absence of legislation, courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors." 342 U.S. at 285. For a number of years this language was relied upon to deny claims for contributions brought under federal law. *See, e.g., Goldlawr, Inc. v. Shubert,* 276 F.2d 614, 616 n.3 (3d Cir. 1960) (antitrust law). However, in 1974 the Supreme Court held that its holding was not as far-reaching as the language suggests. In *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.,* 417 U.S. 106, 111-13 (1974), the Court explained that it had denied contribution in *Halcyon Lines* only because under the facts of that case contribution was inconsistent with the Harbor Workers' Act. It stated:

> [W]e think *Halcyon* stands for a more limited rule than the absolute bar against contribution. . . . On the facts of this case, then, no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors.

The Supreme Court has yet to review a contribution claim in a case outside of the admiralty context since *Cooper Stevedoring.* But a number of lower courts have read *Cooper Stevedoring* as supporting rights of contribution in federal common law claims. *E.g., Professional Beauty Supply Inc. v. National Beauty Supply, Inc.,* 594 F.2d 1179 (8th Cir. 1979) (anti-trust law); *Kohr v. Allegheny Airlines Inc.,* 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975) (aviation law). *But see Olson Farms, Inc. v. Safeway Stores, Inc.* (denying right of contribution in anti-trust law). Thus, *Cooper Stevedoring* provides positive support for our conclusion that a federal common law right of contribution exists.

B.

As we noted above, no right of contribution is expressly provided for in Title VII. This does not, however, end our

inquiry. For this does not necessarily reflect a congressional intention to deny a right of contribution. Rather it reflects the probability that contribution, although of considerable importance, was not contemplated by the drafters of the legislation. We must therefore inquire into the interstices of Title VII to respond to Murphy's claim.

The responsibility of federal courts to define the body of federal common law which arises from the interstices of federal legislation has been established by a number of Supreme Court decisions. *E.g., Illinois v. Milwaukee,* 406 U.S. 91 (1972) (federal common law right of nuisance recognized and applied to the pollution of interstate waters); *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957) (federal labor law); *Texas & Pacific Railway v. Rigsby,* 241 U.S. 33 (1916) (Safety Appliance Act).

The scholarly debate about the power of the federal courts to recognize common law claims rages as does the debate on the source of that power and the extent to which it can be exercised. *See, e.g.,* Ely, *The Irrepressible Myth of Erie,* 87 Harv.L.Rev. 693 (1974); Friendly, *In Praise of Erie—And the New Federal Common Law,* 39 N.Y.U.L.Rev. 383 (1964); Bickel & Wellington, *Legislative Purpose and the Judicial Process,* 71 Harv.L.Rev. 1 (1957). Yet, in spite of the stridency of the debate, two principles firmly and resolutely emerge. First, there is a federal common law. *Illinois v. Milwaukee,* 406 U.S. at 98-102. Second, in some circumstances federal common law causes of action arise from the interstices of congressional acts. *See e.g., Textile Workers v. Lincoln Mills.* Common law actions arising from federal legislation have been recognized in a variety of circumstances, including instances when the common law establishes remedies and standards not set forth in the legislation, but necessary for the fulfillment of the legislative purpose, *e.g., Illinois v. Milwaukee; Textile Workers v. Lincoln Mills,* and instances where the common law provides a cause of action for an individual who has been harmed by the violation of the federal statute. *E.g., J. I. Case Co. v. Borak,* 377 U.S. 426 (1964); *Texas & Pacific*

Railway v. Rigsby. In our review of the literature and the case law we discern two types of cases which establish the framework for our determination of whether a common law right of contribution arises from the interstices of Title VII.

The first are cases in which the common law provides remedies or standards when legislation related to the petitioner's claim does not address the specific situation presented. These cases are illustrated by the seminal decision, *Textile Workers Union v. Lincoln Mills.* In *Lincoln Mills* the plaintiff union charged Lincoln Mills with violating a collective-bargaining agreement. The Supreme Court held that the standards for evaluating the claim were to be found in the federal common law. The Court reasoned that when Congress granted to the federal courts jurisdiction over controversies involving labor organizations in the Labor Management Relations Act, 29 U.S.C. §§ 141-187, it wanted those controversies to be resolved by a federal common law. The Court argued that a uniform federal law was necessary to achieve the purposes of the Act. Although it made no extensive analysis of the source of its power to fashion this body of common law, it noted, "[i]t is not uncommon for federal courts to fashion federal law where federal rights are concerned." 353 U.S. at 457. The exact contours of this body of common law was to be determined by a review of the applicable legislation.

> The Labor-Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.

Id.

A similar analysis was used in *Illinois v. Milwaukee.* In that case the Supreme Court was presented with a common law nuisance action brought by the State of Illinois.

Illinois brought the action against four cities of Wisconsin, the Sewerage Commission of the City of Milwaukee, and the Sewerage Commission of the County of Milwaukee in an attempt to abate the alleged pollution of Lake Michigan, a body of interstate water. The Court found that Congress had a strong interest in "the quality of the aquatic environment as it affects the conservation and safeguarding of fish and wildlife," 406 U.S. at 102, evidenced by legislation such as the Federal Water Pollution Control Act, 62 Stat. 1155, *as amended* (presently codified at 33 U.S.C. §§ 1251 et seq.) and the Fish and Wildlife Act of 1956, 70 Stat. 1119, 16 U.S.C. § 742a. Undaunted by the absence of an express cause of action in any of these acts covering Illinois' claim, the Court held that one existed in the federal common law. It stated:

> The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. 'It is not uncommon for federal courts to fashion federal law where federal rights are concerned.' Textile Workers v. Lincoln Mills, 353 U.S. 448, 457.

Id. at 103. *See also National Sea Clammers Association v. City of New York*, No. 79-1360 (3d Cir. Feb. 5, 1980) (After considering the rationale of *Illinois v. Milwaukee*, this court concluded that there is a "federal common law of nuisance [which] may be enforced by private plaintiffs." Slip Op. at 26.)

The second group of cases are similar yet distinctive. They deal with the specific issue of whether a federal common law action may be brought by an individual who has been harmed by a violation of legislation designed to protect that individual. The earliest Supreme Court decision of that nature seems to be *Texas & Pacific Railway v. Rigsby*. The *Rigsby* Court held:

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in

> default is implied, according to a doctrine of the common law.

241 U.S. at 39. *See generally* Note, *Implied Civil Liability and the Trust Indenture Act,* 52 Tul.L.Rev. 299, 309 (1978).

This issue has been the subject of a number of Supreme Court decisions, and the applicable analysis has become highly developed. In *Cort v. Ash,* 422 U.S. 66 (1975), the Supreme Court set forth a four-prong test:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (emphasis in original; citations omitted). As we have noted, the four-prong analysis of *Cort v. Ash* is designed to "guide the courts in determining legislative intent." *National Sea Clammers Association v. City of New York,* Slip Opinion at 15, *citing, Touche, Ross & Co. v. Redington,* 442 U.S. 560 (1979), and *Trans America Mortgage Advisors, Inc. v. Lewis,* 100 S.Ct. 242 (1979). The inquiry in a right to contribution claim is somewhat different because the party requesting contribution, by definition, will never be a member of the class protected by the legislation. Indeed that party will always be a member of the class *from* whom the "especial" class was to be protected. *Northwest Airlines, Inc. v. Transport Workers,* 606 F.2d 1350, 1354 (D.C. Cir. 1979), *cert. granted,* 48 U.S.L.W. 820 (June 16, 1980).

Although the question presented in each of these cases is different from Murphy's claim we find them helpful in our analysis. For in each of these cases the Court turns to the relevant legislation to determine whether the common law action exists, and ascertains the congressional intent as to

both the underlying goals of the legislation and the specific action presented. It is this methodology which we will use in our evaluation of Murphy's contribution claim.

C.

In our review of the legislative history of Title VII we have not found any materials which explicitly indicate whether or not Congress intended for a right of contribution to exist. The absence of such an explicit reference does not end our inquiry, for "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). As we are "obliged to find an answer [we] must resort to materials from which the congressional intent can only be inferred." *United Parcel Service, Inc. v. United States Postal Service*, 604 F.2d 1370, 1383 (3d Cir. 1979) (Higginbotham, J., dissenting).

The express terms of Title VII demonstrate a congressional intent that unions be held financially liable with employers for unlawful employment practices. Section 703(a), 42 U.S.C. § 2000e-2(a), proscribes employer discrimination, and section 703(c)(3), 42 U.S.C. § 2000e-2(c)(3), holds a union liable not only for discriminatory actions in which it independently engages, but also when it "cause[s] or attempt[s] to cause an employer to discriminate against an individual . . ." Furthermore, section 706(g) expressly states that a court may award damages for "back pay (payable by the employer, employment agency, or labor organization), . . ." 42 U.S.C. § 2000e-5(g). Under these provisions the union and the employer may be held jointly liable when the unlawful activity was a joint undertaking. *See Evans v. Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974) (employer, local union and international held jointly liable for back pay and attorneys' fees); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) (company and union held jointly liable for back pay and attorney's fees); *Commonwealth of Pennsylvania*

v. Local 542, International Union of Operating Engineers, 469 F.Supp. 329 (E.D. Pa. 1978) (union and company held jointly liable for injunctive relief). These provisions reflect a statutory policy that the responsibility for monetary relief should be borne by both unions and employers to the extent that they are responsible for violations of Title VII. A right of contribution would achieve this goal. In contrast, a holding that there is no right of contribution under Title VII would release some individuals from liability.

Other policies underlying Title VII would be served by a right of contribution. In *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417 (1975) (footnote omitted), the Supreme Court emphasized that Title VII's "primary objective [is] a prophylactic one." The Court stated:

> It is the reasonably certain prospect of a back pay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

Id. at 417-18, *quoting United States v. N. L. Industries, Inc.,* 479 F.2d 354, 379 (8th Cir. 1973). Under a rule of contribution "[b]oth union and employer will know that they both must be vigilant to eschew unlawful discrimination and that the employee's predilections as to whom to sue will not insure either immunity from the mandates of the law." *Northwest Airlines Inc. v. Transport Workers Union of America,* 14 E.P.D. ¶ 7730, 5596 (D.D.C. 1977), *rev'd on other grounds,* 606 F.2d 1350 (D.C. Cir. 1979), *cert. granted,* 48 U.S.L.W. 3820 (June 16, 1980). *Cf. Globus, Inc. v. Law Research Service, Inc.,* 318 F.Supp. 955, 958 (S.D.N.Y.), *aff'd,* 442 F.2d 1346 (2d Cir. 1971), *cert. denied,* 404 U.S. 941 (1971) (implied right of contribution would strengthen "the deterrent impact of the securities law").

A right of contribution would also serve the Title VII policy of favoring conciliation and settlement of these claims. "[C]ooperation and voluntary compliance . . . [are]

the preferred means for achieving'' the goal of equality of employment opportunities. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). This is shown by the facts of this case. If Murphy had felt that it had no right of contribution against the unions it might have been unwilling to reach a settlement with the plaintiffs. It might have chosen instead to proceed with the litigation so that the unions would be held responsible for a share of the damages. Further, the contribution rule prevents a plaintiff from becoming unjustly enriched either by collusive activity with one of the defendants, or by threatening one defendant that the suit will be brought only against it, thereby forcing an unjustified settlement. *See* Note, *Settlement in Joint Tort Cases*, 18 Stan.L.Rev. 486, 490 (1966).[2]

A right of contribution would implement the congressional intent to hold both unions and employers liable for unlawful employment practice and would aid the conciliation and settlement goals of Title VII. Thus, we hold that a federal common law right of contribution exists when a defendant charged with a violation of Title VII settles with a plaintiff prior to trial for the full amount of damages and requests contribution from a non-settling co-defendant who is jointly liable.

D.

The dissent argues that by choosing, in this case, the rule of decision which we believe to be the better one we are unjustifiably performing a legislative function. It concedes

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[2] Some critics of the contribution rule argue that contribution in fact serves to restrict settlements. They assert that a settling defendant may be fearful of settling and being held liable in contribution for a portion of an award assessed against a co-defendant who went to trial We do not agree that the potential for this problem should destroy the right entirely. That problem has been dealt with by courts who have been faced with requests for contribution involving settlements in other areas of the law. *See e.g.*, McLean v. Alexander, 449 F.Supp. 1251 (D.Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979) (securities law).

that we are dealing with a subject matter requiring a uniform federal rule of decision. Thus we and the dissent agree that adoption of a contribution rule is no invasion of an area which state lawmaking authority, legislative or judicial, can claim as its own. The dissent's complaint is that by adopting what we think is the better rule of decision we are invading the exclusive preserve of Congress. If we were to announce a federal rule of decision implied from a constitutional provision,[3] and thus arguably beyond the future control of Congress there might be some merit to the dissent. *See* Monaghan, *Forward: Constitutional Common Law,* 89 Harv. L. Rev. 1 (1975). But the rule of decision which we have found to be preferable could be changed by Congress tomorrow.

The difficulty with the dissent's argument on legislative function is that it concedes "If it was clear, as my colleagues apparently believe, that a right of contribution would strengthen the deterrent impact of Title VII, then there might be a judicial responsibility to make those rules which are needed to effectuate the significant national policy represented by the statute." Typescript Opinion at 41. There are countervailing arguments, and the policy choice is a difficult one. But the litigants before us have tendered the issue, and its closeness does not absolve us from the obligation to decide it. Nor does our action become an impermissible encroachment on the legislative branch, merely because of the difficulty of the issue presented. Whether we reject or adopt a contribution rule we must make a choice.

If we were to be convinced that a rule prohibiting contribution better served the purpose of Title VII our adoption of that rule would stand in relationship to Congress on exactly the same footing. The logic of the argument that adoption of a rule prohibiting rather than permitting

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[3] *See, e.g.,* Riley v. Chester, 612 F.2d 708 (3d Cir. 1979) (implying a federal common law press privilege from the first amendment).

contribution would be less legislative escapes us. Certainly the party whose claim for contribution was rejected would not think we acted any less legislatively in rejecting it. Reliance on deference to the legislative process cannot conceal the fact that the dissent has made such a choice.

IV. *Calculation of Liability*

Each of the parties argues that if we hold that a right of contribution exists we should order a modification of the judgment because the district court did not apply the correct rules of law when it calculated the International's liability. We do not agree.

Using the $648,000 settlement figure which had been reached by Murphy and the class members as the starting point of its calculations, the district court allocated $529,752 to the Title VII claim. It held Murphy responsible for $264,876 of the Title VII liability and the unions—the International, Local 940 and Local 249—jointly responsible for the remaining $264,876. The court then subtracted from the unions' share a proportion which it allocated to Local 249, $18,393, and the $4,146 which Local 940 had paid Murphy.[4] Judgment against the International was entered in the amount of $242,337.

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[4] We summarized the calculiations in the first appeal as follows: The district court excluded the $100,000 from the amount to be allocated for contribution ruling that a labor organization could not be liable under the Equal Pay Act. The court found the settlement between Murphy and the plaintiff to span a period of time beginning July 1, 1965 and ending June 30, 1971, a period of 72 months. The court found the union collectively liable for $224,000, 50% of the plaintiffs' $448,000 Title VII recovery. The International's share of the responsibility for the Title VII recovery was 67/72 since it was for 67 months of the 72 month period that the International and Local 940 represented Murphy's employees. Thus, the Internation's liability for the Title VII claim was $208,444, or 67/72's of $224,000. For the purpose of contribution attorneys' fees were apportioned. The district court determined that of the $100,000 attorneys' fees $81,752 was attributable to the

A.

The International argues that it should have been assessed for only 50% of the liability which was attributed to the unions because it had been held equally liable with the local unions. We do not agree. The district court found Murphy responsible for half of the Title VII liability and the union's collectively responsible for the other half. The court held the unions liable as a group for half of the damages because they had acted jointly in the collective-bargaining negotiations with Murphy. It was therefore reasonable when it became apparent that Local 940 could pay only $4,146, for the court to hold the International's responsible for the remaining portion.

B.

Murphy argues that the district court should have included in its calculations the interest Murphy paid because it paid the plaintiffs in three installments. We do not agree. The deferred payment schedule benefitted Murphy as it had use of the money during that period. It would have

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Title VII claims. This was done by taking the ratio of the Title VII recovery, or $448,000, to total recovery, or $548,000, and the total amount of attorneys' fees.

Title VII Recovery ($448,000)
Total Recovery ($548,000)

=

Title VII Attorneys' Fees
Total Attorneys' Fees ($100,000)

The International's contribution to the attorneys' fees for the Title VII recovery was based on the same percentage, 67/72 used to determine its Title VII contribution. Thus, the court below found the International liable for $38,039, 67/72's of $40,876, 50% of the Title VII attorneys' fees, or $38,039. Credited against the International's liability was the $4,146 settlement Murphy received from Local 940. A judgment in favor of Murphy and against the International was entered in the sum of $242,337 on April 29, 1976.

Glus v. G. C. Murphy Co., 562 F.2d at 884 (footnote and citations omitted).

been improper for the court to have permitted Murphy to recoup from the International the monies it paid the plaintiffs for that benefit.

C.

Murphy also objects to the district court's decision not to award it pre-judgment interest. The general rule is that when the damages are ascertainable "with mathematical precision pre-judgment interest is awardable as of right." *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951, 973 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976). If, however, the claim is not for a liquidated sum, the decision on whether to award interest is within the sound discretion of the court. *Id.; Thomas v. Duralite Co., Inc.*, 524 F.2d 577, 589 (3d Cir. 1975). The district court did not abuse its discretion by not awarding pre-judgment interest. The International did not unduly delay the litigation. An award of interest here would punish the International unfairly because it exercised its right to proceed to trial.

D.

The International argues that its liability should be recalculated because the damage settlement included monies for all females who were employed from July 2, 1965 to January 31, 1971, even though a number of those employees had terminated their employment in the years 1965 through 1968. For the first time in this litigation it argues that the claims of these terminated female employees were erroneously computed into the settlement because those employees could not have filed timely charges in July of 1969 when the EEOC charges underlying this case were filed. The International argues that these claims must be excluded from any back pay calculations since those former employees cannot be members of the plaintiff class relying on *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). This case is distinguishable from *Wetzel* because here the International

stated explicitly on the record that it had " 'no objection to the *amount* of the settlement and/or as to the determination of the legal fees . . .' " *Glus I,* App., at 173a. (emphasis added). By agreeing to the amount of the settlement (though of course contesting its liability) the International shrewdly limited its maximum exposure to Title VII damages. The company could have argued that the Equal Pay Act settlement of should have been less and the Title VII damages more than $448,000. We adopt the trial judge's response that it is now "too late to raise such an objection."

> The International's objections must be rejected. On October 2, 1971, at the hearing held by the court on the consent decree, the International, on the record, stated that it had "no objection to the amount of the settlement and/or as to the determination of the legal fees . . ." while it, of course, reserved the right to challenge Murphy's claim for contribution (Tr. 11). At the hearing, Local 249 indicated that it was adopting the same position. Both of these unions had notice of every hearing and conference held by the court on the settlement procedures, and no objection of any kind was lodged. It is too late to raise such an objection.

Id.

Further, the settlement figure does not reflect a detailed calculation of the damages due each member of the class as would have been required at a trial. The district court noted that, if calculated, the defendants' liability may have been as high as $800,000. *Id.* at 176a. The settlement reflects a compromise reached by Murphy and the plaintiff class and it reflects not only mathematical calculations on lost wages, but also the strengths and weaknesses of the legal arguments which could have been made for either party or varying members of the class. We therefore will affirm the district court's reliance on the settlement figure in its calculation.

V.

For the foregoing reasons, we will affirm the judgment of the district court.

SLOVITER, *Circuit Judge*, dissenting.

I depart from the opinion of my colleagues because it assumes unto the judiciary the authority to make a federal common law of contribution for a claim arising out of a federal statute which does not expressly provide for contribution, does not imply that contribution is authorized, and does not require contribution for the effectuation of its purposes. I do not disagree with the majority regarding the existence of judicial power to formulate common law. The explanation that Justice Brandeis' broad statement "[t]here is no federal general common law"[1] has opened the way to "specialized federal common law"[2] is now well established.[3] Nor do I disagree with the assumption implicit in the majority opinion that the need for uniformity in application of this federal statute requires us to look to federal, rather than state, law. However, I believe the judicial task of establishing, formulating or discovering federal common law is qualitatively different from the judicial task of filling in the interstices of congressional acts. It is a difference which the majority has not addressed. It underlies my different interpretation of the relevant precedent and leads me to a different result in this case.

I believe it will be useful to begin analysis by some review, however cursory, of the instances in which the Supreme Court has assumed lawmaking power. This should assist in placing in perspective the question as to whether exercise of such power is appropriate in this situation. Without undertaking to make a comprehensive categorization, it is frequently suggested or posited that federal common law has been undertaken in the following instances: (1) where the Constitution provides exclusive jurisdiction in the federal courts and no federal statute

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[1] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[2] Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964).

[3] *See, e.g.*, cases referred to in *Rules of Decision in Nondiversity Cases*, 69 Yale L. J. 1428, 1434 (1960).

supplies the rule of law; (2) where a federal statute provides federal jurisdiction but does not supply the rule of law; (3) where a federal statute provides the rule of law but is silent on the existence of a private cause of action; and (4) where a federal statute provides both a cause of action and the rule of law, but has left what has been denominated as "interstices."[4]

(1) *Disputes Within Exclusive Federal Jurisdiction.*

The circumstances in which the establishment of federal common law is the most inevitable arise where the federal courts have been given exclusive jurisdiction by the Constitution, but where Congress has not legislated to supply a rule of law. Historically, this has arisen most frequently in instances of disputes between states and in maritime cases.

Disputes between the states have often concerned their respective rights to water resources or controversies over boundary lines. One example suffices to illustrate why establishment of federal common law was required as a matter of sheer necessity. In attempting to resolve the dispute between Kansas and Colorado regarding their respective rights in the waters of the Arkansas river, the Court articulated not only the necessity of making a judicial decision but also of formulating federal common law. The Court recognized that if the two states were independent nations, their dispute over whether Colorado could divert river water which arose in that state could be settled by force. Resort to force was eliminated under our federal system of government, so the solution to the dispute must, of necessity, be made by judicial determination. *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). Since disputes between the states are within the exclusive jurisdiction of the federal courts, there was no other judicial forum which could have heard the dispute.

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[4] These categories are in large part a paraphrase of those referred to in Friendly, note 2 *supra*, at 421.

Although establishment of federal common law was not strictly mandated, because presumably the Court could have decided to follow an already established fixed reference point, as a practical matter there was no such fixed reference point. Each state recognized opposing legal principles. Kansas recognized the common law of riparian rights, while Colorado recognized public ownership of flowing waters. Accordingly the Court determined to "apply Federal law, state law, and international law, as the exigencies of the particular case may demand." *Kansas v. Colorado,* 185 U.S. 125, 147 (1902). The Court recognized that through these successive disputes between the states and its own decisions, it was "practically building up what may not improperly be called interstate common law." *Kansas v. Colorado,* 206 U.S. at 98. Subsequent cases have followed that lead. Even when the same rule of common law was applied in both states, the Court held that it was not bound to follow that rule as part of the federal common law. *Connecticut v. Massachusetts,* 282 U.S. 660, 670 (1931). Neither the statutes nor decisions of either state can be conclusive on the issue of apportionment between the two contesting states because the question is one of federal common law. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

If the interstate nature of a controversy makes it inappropriate that the law of a particular state should govern, *a fortiori* the necessity to make law in admiralty cases also requires search for a broader base. The Court has frequently stated that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975) (quoting *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963)). *See also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405 n. 17 (1970); *Kermarec v. Compagnie Gerale Transatlantique,* 358 U.S. 625, 630-32 (1959). In such cases, because of the absence of statutory law, the Court is required to make law, and it deems itself free to formulate flexible and fair remedies in

the law maritime. *United States v. Reliable Transfer Co.*, 421 U.S. at 409.

A similar construction of federal common law has been found necessary when the suit involves the rights and duties of the United States in the issuance of commercial paper, because the application of state law would subject the rights and duties of the United States to exceptional uncertainty. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). *See also Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947); *National Metropolitan Bank v. United States*, 323 U.S. 454, 456 (1945); *United States v. Standard Rice Co.*, 323 U.S. 106, 111 (1944). The Court has also stated that federal law should be applied where property rights of the United States are litigated. *United States v. Standard Oil Co.*, 332 U.S. 301, 306 (1947).

In yet another area, the Court has iterated the power of the federal courts to make law. In a judicial dispute affecting relations with foreign nations, the Court noted the "uniquely federal" nature of the problems involved. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964). As in the other instances of establishment of federal common law which fall into this category, the Court might have turned to state law to supply the rule of decision. In the *Sabbatino* case, the state of New York had previously enunciated the act of state doctrine, which was the doctrine ultimately reaffirmed by the Court in its determination of federal common law. Nonetheless, the Court emphatically asserted that the issue was one of federal law and it undertook to make the substantive law decision:

> However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co.* v. *Tompkins*. Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of

> Justice, recognized the potential dangers were *Erie* extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.

Id. at 425 (footnotes omitted).

The conclusion which emerges from a reading of these cases is that establishment of a federal common law in this category of cases was compelled by considerations of federalism and the constitutional distribution of powers between the federal government and the states.

(2) *Disputes for which Federal Statutes Create Jurisdiction.*

A situation somewhat analogous to that posed by cases in the first category is presented when federal common law must be created or determined because a federal statute supplies federal jurisdiction but does not supply the substantive rule of law. The principal example of this arose from section 301(a) of the Labor-Management Relations Act of 1947 which, as construed in *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), obliged the courts to fashion substantive federal law from the policy of our national labor law.[5] The Court construed its task and its reference point as follows:

> The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be

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[5] It may be possible to view the statute giving the federal courts jurisdiction of maritime claims "saving to suitors in all cases all other remedies to which they are otherwise entitled", 28 U.S.C. § 1333 (1976), as another instance of Congressional authorization to the judiciary to fashion federal common law. However, the federal courts were vested with jurisdiction of admiralty claims by Article III, section 2 of the Constitution, and hence the need to undertake fashioning appropriate rules of law would be the same even without the federal statute.

> resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.

Id. at 457 (footnotes omitted).

Justice Frankfurter dissented not because he thought state law should be applied, but because he believed that the allocation of institutional function was seriously wrong. *Id.* at 464-65. The Court might have refused to perform the function imposed on it by Congress because of the nonjudicial nature of that function,[6] and presumably, Congress would then have been forced to fill the gap either by creating statutory substantive law or selecting a fixed reference point. However, having failed to do so, the nature of the Court's task in formulating federal common law is not substantially different from that required of it in the situations which come within category 1 above.

(3) *Implication of a Federal Cause of Action.*

The third category of cases which have sometimes been referred to as those in which the courts create federal common law deals with the question of the circumstances under which the courts should imply a federal cause of action. In its most frequent form, the question arises as to the implication of a federal cause of action when a statute creates obligations and a substantive rule of conduct, but is silent on whether a private right of action should be permitted for violation of the rule of conduct. The majority opinion refers to the analysis of *Cort* v. *Ash,* 422 U.S. 66 (1975), as helpful because the Court turned to the relevant legislation to determine whether "the common law action exists."

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[6] See Bickel and Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 Harv. L. Rev. 1, 14-35 (1957), where the authors suggest that the appropriate disposition of *Lincoln Mills* in view of the institutional incapability of the court to perform the function placed on it by Congress would have been to dismiss the suit for lack of jurisdiction without questioning the constitutional basis for the statutory section.

Typescript op. at pp. 12-13. However, analytically, the judicial task in framing, creating or uncovering federal common law which must be performed under the instances falling within categories 1 and 2 above is substantially different from that which is required in deciding whether a private right of action should be implied. In the latter situation, there is no need to make law, as such. The fixed reference point is given, since it is the statute which creates the obligation itself. The judicial function is simply the ascertainment of legislative intent, and the rules for its ascertainment have been established by the Court. Indeed, some policy analysis is needed but it is policy analysis in the context of articulated legislative action. However difficult the task may be to divine legislative intent from sometimes obscure origins, the result of the inquiry as to whether a federal cause of action should be implied is a one-word answer, either yes or no. Having decided on that answer, no further judicial legislation is needed.

(4) *Filling in Statutory Interstices.*

On any given day in which opinions are announced, the Supreme Court must decide numerous issues of statutory construction. Selecting at random a recent day, February 20, 1980, six of the eight opinions announced involved a Congressional statute and required that the Justices attempt to clarify an issue left unresolved by the statutory language. For example, in *Stafford* v. *Briggs*, 48 U.S.L.W. 4138 (U.S. Feb. 20, 1980), the issue was whether a "civil action" as used in section 2 of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1391(e), providing expanded choice of venue in suits against federal officers, was limited to mandamus-type actions. Chief Justice Burger, writing for the majority, noted the familiar tenet of statutory construction that, in interpreting a statute, "the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the object and policy of the law. . . ." (quoting *Brown* v. *Duchesne*, 60 U.S. 183, 194 (1857)). In

Seatrain Shipbuilding Corp. v. *Shell Oil Co.*, 48 U.S.L.W. 4149 (U.S. Feb. 20, 1980), the Court was obliged to determine whether Section 506 of the Merchant Marine Act, 1936, 46 U.S.C. § 1151 *et seq.*, gave the Secretary of Commerce authority to release subsidized vessels from the foreign-trade only requirement upon full repayment of the subsidy. Despite the absence of any explicit statutory language to that effect, the Court determined that the deletion of the prior explicit authorization did not represent a considered congressional judgment that the transaction should be prohibited. In *California Brewers Association* v. *Bryant*, 48 U.S.L.W. 4156 (U.S. Feb. 20, 1980), the Court had to determine the meaning of the words "seniority system" used in Section 703(h) of Title VII of the Civil Rights Act of 1964, which are not comprehensively defined in either the statute or the legislative history. In *United States* v. *Euge*, 48 U.S.L.W. 4184 (U.S. Feb. 20, 1980), the language of a section of the Internal Revenue Code, 26 U.S.C. § 7602, requiring persons summoned to "appear" and "give testimony," was construed to authorize the obligation to provide handwriting exemplars although the section does not, by its terms, compel such production.

In each of these cases one could contend that there were statutory interstices. Certainly, no statutory language resolved the issue definitively. However, it would be imparting too much to the Court's interpretive function to view the process as one of lawmaking. It is impossible for the legislature to anticipate every possible issue of interpretation that may arise in the application of a statutory scheme, and hence it is inevitable that there will be unintended gaps in legislation. Other gaps may result from a legislative unwillingness or inability to resolve a delicate issue. The nature and importance of the gaps may vary. But the touchstone of judicial responsibility in dealing with such statutory gaps is to ascertain, to the best extent possible, the Congressional intent, and to interpret the statute in light of the statutory scheme. There is a fixed reference point—the statutory provision, other language in the sta-

tute, and the legislative intent—which delimits the parameter of judicial action.

One need only compare that limited task with the one assumed by the Supreme Court when it makes federal common law to see the magnitude of the difference. When the courts act as lawmakers they are free to roam through the fields of scholarly lore and policy considerations to select rules they deem appropriate. When the issue is not controlled by statutory or constitutional provisions or by past decision, the court is free to select the rule which it believes is the fairest and easiest to apply administratively. See *Texas v. New Jersey*, 379 U.S. 674, 677 (1965). It can accept those arguments it deems sound, and, by judicial fiat, impose that law on the parties. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975).

There is no such freedom in the judicial task of filling in interstices of federal statutes where we must follow the lodestar of Congressional intent. The difference between the two tasks is in large part a function of different constitutional underpinnings. When the federal courts fashion federal common law as lawmakers, they are acting to assert the supremacy of national law which is a fundamental rock on which our federal system is hewn. On the other hand, when the federal courts fill in interstices or attempt to determine if a private right of action should be implied from a federal statute, the courts are acting on a far different basis—that which stems from the constitutional allocation of power among the branches of government.

In the cases which fall within categories 3 and 4, there is no issue whether federal law should govern. That decision was already made by Congress, whose intent must be carried out if the separation of powers given to each branch of government are to be observed. In contrast, the formulation of federal common law does not on its face raise any issue of allocation of powers. In fact, in these cases where common law has been made, one may consider the courts' lawmaking as implicitly authorized by Congress because it

failed to fill in the gap left by the constitutional grants of jurisdiction. Congress could act, if it deemed it appropriate to do so, since it is unlikely that the federal judiciary has broader lawmaking power in federal matters than Congress has.[7] Although there has been some suggestion that the Court's opinion in *Sabbatino* was asserting judicial power to make law independent of the other branches of the national government, there are other more conservative bases on which to read that opinion.[8]

The majority opinion relies on the decision in *Illinois v. City of Milwaukee, Wisconsin*, 406 U.S. 91 (1972), as authority for the power it asserts to make common law when "necessary for the fulfillment of the legislative purpose." *Typescript op. at p. 9.* It appears that the majority reads that decision as one falling within the category authorizing courts to fill in statutory interstices. I do not read the case that way, but instead believe that it falls within the category 1 cases where there is federal jurisdiction but no applicable federal statute. In that case, Illinois sued Milwaukee to abate the public nuisance caused by its discharge of pollution into Lake Michigan, a body of interstate water. There was no federal statute which applied. Had there been, the issue might have been whether private suit was authorized, as in *Cort v. Ashe*, but there would have been no occasion for the Court to decide whether it had original jurisdiction on the basis of plaintiff's status as a state.

Furthermore, if there had been an applicable statute, that statute would have qualified as a "law" of the United States within the meaning of 28 U.S.C. § 1331(a) (1976), and there would have been no occasion for the Court to decide that federal common law is within the meaning of "laws" for purposes of § 1331(a). Although there were several congressional statutes which touched upon the field of water pollution, their inapplicability obliged the Court

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[7] See Friendly, note 2 *supra* at 395.

[8] See Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 Colum. L. Rev. 805 (1964).

to decide whether there was a federal common law of nuisance. It did so by relying on the cases previously discussed here in connection with category 1: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . .," *id.* at 103.[9] The Court specifically recognized the inapplicability of any federal statute:

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. . . . There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern.

Id. at 107-08 (footnotes omitted). The basic difference between the situation in *Illinois v. City of Milwaukee, Wisconsin* and that in the cases of statutory interstices, such as we have here, is that in the latter category, federal courts are not free to "appraise the equities," but must leave that function to Congress.

In fulfilling our function as interpreters, we must be guided by the principle that we must not overstep into the legislature's domain, for reasons of both principle and pragmatics. As Judge Friendly has commented:

> [T]he legislature's superior resources for fact gathering; its ability to act without awaiting an adventituous concatenation of the determined party, the right set of facts, the persuasive lawyer, and the perceptive court; its power to frame pragmatic rules departing from strict logic, and to fashion a broad new regime or to bring new facts within an existing one; its prac-

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[9] The courts of appeal have divided over whether the federal common law of nuisance can be applied to intrastate pollution of navigable waters. *Compare* Illinois v. Outboard Marine Corp., No. 79-1341 (7th Cir. Mar. 28, 1980) *with* Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976) *and* Reserve Mining Co. v. EPA, 514 F.2d 492 (8th Cir. 1975).

> tice of changing law solely for the future in contrast to the general judicial reluctance so to proceed; and, finally, the greater assurance that a legislative solution is not likely to run counter to the popular will: all these give the legislature a position of decided advantage, if only it will use it.[10]

Turning to the statute at hand, it is questionable whether there even exists in Title VII of the Civil Rights Act of 1964 the statutory interstice found by the majority. The statute establishes a comprehensive program designed to eliminate discrimination of the type specifically addressed. It establishes the rule of law, administrative agency enforcement, private rights of action, and specified procedures which must be followed. It can operate effectively, and indeed has operated effectively since its enactment without a right of contribution by one defendant against another defendant. None of the compulsion that requires the courts to act, either as legislators or as interpreters, is applicable here. Although the refusal to take action is, of course, in itself action, there is a substantial difference between the affirmative action needed to make law or interpret equivocal statutory language and the action which consists merely of declining to alter the status quo.

Even if we were to apply the statutory interpretive rules used when there are, in fact, interstices, they do not lead to the implication of a right of contribution in Title VII. Congress, at the time of its enactment, was well aware that the traditional rule applicable in federal courts was that no right of contribution existed. This had been established by the Supreme Court when it said, "In the absence of legislation, courts exercising a common law jurisdiction have generally held that they cannot on their initiative create an enforceable right of contribution among joint tortfeasors." *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1951). The then prevalent

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[10] Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 Colum. L. Rev. 787, 791-92 (1963) (footnotes omitted).

view was articulated by this court when it arose, as it frequently did, in the context of a claim for contribution under the federal antitrust laws:

> Since both sets of claimed torts are declared in the complaints to be actionable solely by reason of federal law there would seem to be strong justification for appellee's contention that the tort asserted to lie in the third party complaint is governed by federal common law with no right of contribution between tort feasors.

Goldlawr, Inc. v. Shubert, 276 F.2d 614, 616 (3d Cir. 1960) (footnotes omitted).

The rule of no contribution in antitrust actions has been consistently followed by the federal courts, with but one recent exception. *Olson Farms v. Safeway Stores*, [1979] 2 Trade Cas. (CCH) ¶ 62,995 (10th Cir. 1979); *Beef Industry Antitrust Litigation v. Meat Price Investigators Association*, 607 F.2d 167 (5th Cir. 1979); *Wilson P. Abraham Construction v. Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979); *El Camino Glass v. Sunglo Glass Co.*, [1977] 1 Trade Cas. (CCH) ¶ 62,533 (N.D. Cal. 1976); *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. 1339 (S.D.N.Y. 1969); *contra, Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979).[11] See Sellers, *Contribution in Antitrust Damage Actions*, 24 Vill. L. Rev. 829 (1979).

I do not view the decision in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), as in any way inconsistent with the general principle that contribution is usually to be found in a statute, if at all. In *Cooper*, the Court was applying the well-established maritime rule allowing contribution between joint tortfeasors. *Id.* at 106. *Cooper*

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[11] Suit by an employer against an employee for indemnification for antitrust penalties, damages and expenses incurred because of the employer's antitrust liability based on the employee's activities was permitted in *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277 (10th Cir. 1969). See Paul, *Contribution and Indemnification Among Antitrust Coconspirators Revisited*, 41 Fordham L. Rev. 67 (1972).

belongs to that category of maritime and admiralty cases where the Court is free to make law or, as it did there, follow well-established precedent. In fact, the Court in *Cooper* cited *Halcyon* as reflecting the Court's disinclination to allow contribution where it might be inconsistent with the balance struck by Congress in enacting legislation. *Id.* at 112.

Congress was not unaware that, in order to provide for contribution in a claim based on a federal statute, it must make explicit provision for such in the statute itself. That is precisely what Congress did in the Securities Act of 1933, when it provided that "All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment. . . ." 15 U.S.C. § 77k(f) (1976). Provisions for contribution similar to this also appear in the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 78i (e), 78r(b) (1976). Whatever force there may be in the argument that the subsequent enactment of a specific statutory provision in the Securities statutes cannot shed light on Congressional intent as to the antitrust laws, enacted more than two decades earlier,[12] it is inapplicable to Title VII which was itself enacted substantially after Congress framed the specific provisions for contribution in the Securities Laws.

The Supreme Court has recently had occasion to consider the propriety of changing a judicially created rule on which Congress may have relied when enacting legisla-

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[12] In Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1183-84 (8th Cir. 1979), the court opined that "the presence of contribution provisions in the security laws is some indication that if the question were presented today, Congress would include a right to contribution as part of the antitrust laws."

tion. In *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), the Court was asked to impose a proportionate-fault rule in maritime law. After determining that it could not find such an intent in the congressional statute, the Court was obliged to determine whether it should nonetheless make the change in light of "sound arguments supporting division of damages between parties before the court on the basis of their comparative fault." *Id.* at 27. It declined to do so. It was "mindful that here we deal with an interface of statutory and judge-made law," *Id.* at 272, and concluded:

> Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results than Congress envisioned.

Id. at 273. One can assume in the absence of contrary indication, that when it enacted Title VII Congress both was aware of and relied on the established rule that contribution would not be implied in the absence of a statutory provision.

Imposition by the judiciary of a rule of contribution in Title VII cases would raise numerous administrative questions which we are ill-equipped to decide. For example, if contribution is to be implied, should it be equal contribution or should it be based on proportionate fault? Should responsibility be allocated in some fashion among intentional and unintentional joint tortfeasors, such as was formerly found in the Uniform Contribution Among Tortfeasors Act? See 129 Uniform Laws Ann. 233 (1975). Should the settling defendant be protected from liability for contribution to later sued defendants? Although the majority attempts to face some of these issues, they are on their face, hardly suitable for judicial determination in the context of a fixed statutory scheme. As Justice Brennan commented recently in another context, "To suggest the elements of such a test, however, is to expose how ill-suited a court is to define them adequately. It is Congress which

has the resources and responsibility to fashion a rule . . . that comports with the objectives of the . . . Act." *Kissinger v. Reporters Committee for Freedom of the Press*, 48 U.S.L.W. 4223, 4229 (U.S. Mar. 3, 1980) (concurring and dissenting).

In his respected and often cited article on judicial lawmaking and statutory interpretation, Justice Schaefer recognized that it is inevitable that judges should make law. However, it may have been the difficulties of balancing the equities and administrative decisions required to formulate a law of contribution that led Justice Schaefer to use contribution as an illustration of a situation in which the courts should refrain from acting in the absence of legislative command. He writes:

> Two more commonplace situations may also serve as illustrations. With respect to both of them I think there would be general agreement as to the unsatisfactory quality of the existing rule. At common law there is no contribution among joint tortfeasors. When the negligence of more than one person contributes to the injury to the plaintiff, each of the guilty parties is liable for the full extent of the resulting damage, regardless of the degree to which the damage resulted from his negligence. And the plaintiff may have his choice among the defendants. One joint tortfeasor, perhaps least responsible morally and legally, but typically most responsible financially, can be called upon to satify the entire judgment. And, having done so, he has no right to call upon his codefendant to shoulder a part of the burden. In a few jurisdictions the problem has been met by provisions requiring contribution among joint tortfeasors. So far as I am aware, *that change in the law has always been accomplished by statute. The reason, I think, is that the problem is not self-contained.* It cannot be satisfactorily solved by judicial announcement of a rule requiring contribution among joint tortfeasors. To operate satisfactorily a system of comparative negligence would be necessary with resulting complication as to jury verdicts. The other common-law rule is that a judgment against two joint tortfeasors is to be regarded as a unit. If the judgment is set aside as to one defendant, it must be set

> aside as to all. That doctrine is obviously unsatisfactory, and courts have not hesitated to depart from it. The problem is self-contained, and the rule with respect to the joint judgment can be eliminated without affecting other areas.

Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. 3, 13 (1966) (footnotes omitted) (emphasis added).

If it was clear, as my colleagues apparently believe, that a right of contribution would strengthen the deterrent impact of Title VII, then there might be a judicial responsibility to make those rules which are needed to effectuate the significant national policy represented by the statute. In that situation we would be acting in a manner consistent with our interpretation of congressional intent, rather than legislating a rule which the majority believes is demanded by "fundamental fairness." *Typescript op. at 7.* However, I do not share the belief that contribution is required for this purpose. There is a possibility that it would have the opposite effect. It might deter settlement if a settling defendant would remain liable to nonsettling defendants for contribution, since it would preclude the most meaningful characteristic of settlement: final and complete termination of involvement in the case. See *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F.Supp. at 1346. On the other hand, a rule against contribution might very well encourage deterrence because potential violators would be more likely to refrain from violations if they knew that any injured party could impose the full burden of recovery on any one of them even though it played only a relatively minor part in the activity. *See Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d at 1189 (dissenting opinion), quoted in *Olson Farms, Inc. v. Safeway Stores, Inc.*, [1979] 2 Trade Cas. ¶ 62995 at 79,703.

In sum, the arguments as to the effect of a rule of contribution are inconclusive. They may cut either way. They encompass policy judgments and considerations which Congress should evaluate and adjust. While I believe my two colleagues are at least as able to perform that task as are

many of the legislators, they have not been given the responsibility to do so under our constitutional allocation of powers. I agree with Judge Gibbons' comments when he argued we should refuse to create a federal common law of immunity for army surgeons: "Instead of deferring to future Congressional judgment on the creation of absolute immunity in this kind of suit, the majority has chosen to weigh the competing policy considerations and to make an essentially legislative judgment. It has done so, however, without the benefit of the interplay of the various competing interests which, by design, appropriately occurs within the legislative arena. . . ." *Martinez v. Schrock,* 537 F.2d 765, 775 (3d Cir. 1976) (dissenting).

Under the circumstances presented in this case, we should not engage in lawmaking as a naked exercise of power where we have neither constitutional nor statutory authority, but should leave to Congress any action which would drastically change the current rule.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

United States Court of Appeals
FOR THE THIRD CIRCUIT

Nos. 79-1507 and 79-1508

JOANNE GLUS, et al.,

v.

THE G. C. MURPHY COMPANY, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 940 AND INTERNATIONAL UNION OF WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO

INTERNATIONAL UNION OF WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,
Appellant in No. 79-1507

G. C. MURPHY,
Appellant in No. 79-1508

(D.C. CIVIL No. 71-0264)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PRESENT:
GIBBONS, HIGGINBOTHAM AND SLOVITER,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on November 15, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court, filed February 15, 1979, be, and the same is hereby affirmed. Costs taxed against appellant in each case.

ATTEST:
M. ELIZABETH FERGUSON
Chief Deputy Clerk

June 27, 1980

Certified as a true copy and issued in lieu of a formal mandate as to No. 79-1507 on July 29, 1980.

Test: SALLY MRVOS

Clerk, United States Court of Appeals for the Third Circuit

APPENDIX C

United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 79-1507

JOANNE GLUS, et al.,

v.

THE G. C. MURPHY COMPANY, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 940 AND INTERNATIONAL UNION OF WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO

Appellant

SUR PETITION FOR REHEARING

PRESENT:

SEITZ, *Chief Judge;* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM AND SLOVITER, *Circuit Judges*

THE PETITION FOR REHEARING FILED BY THE INTERNATIONAL UNION OF WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO.
Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in bane, the petition for rehearing is denied.*

By the Court,
A. LEON HIGGINBOTHAM
Circuit Judge

Dated: July 21, 1980

* Judges Garth and Sloviter would grant the petition for rehearing.

APPENDIX D

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NO. 71-264

JOANNE GLUS, et al.,

Plaintiffs

v.

THE G. C. MURPHY COMPANY, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL 940 AND INTERNATIONAL UNION OF WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO

Defendants

OPINION

BARRON P. MCCUNE, *District Judge*, February 14, 1979

We consider in this opinion the remand of this case by the United States Court of Appeals for the Third Circuit. One determination is required by the remand; whether the defendant, the International Union of Wholesale and Department Store Union, AFL-CIO (International) can be held liable in an action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, even though the International was not named in the charge to the Equal Employment Opportunity Commission (EEOC) or made a party to EEOC conciliation. The background of this protracted action is set forth in the opinion of the Court of Appeals, *Glus v. G. C. Murphy Co.*, 562 F.2d 880 (3rd Cir. 1977) (remand or the remand opinion), and will not be repeated here. We confine our consideration solely to the two factual issues posed by the Court of Appeals; whether the International was actually named in the charge before the EEOC, and if not named, whether plaintiff should be held in strict compliance with the requirement that the International be named in the charge to the EEOC.

A hearing was held on the issues posed by the Court of Appeals on September 12, 1978. Evidence was presented by the International and G. C. Murphy Company (Murphy).[1] Because Murphy has entered into a settlement agreement with the plaintiff class, Murphy took the position at the hearing which normally would be taken by the plaintiff class representative.

After consideration of the evidence presented and the briefs and argument of the parties, we find the International was not named in the charge before the EEOC. Based on our conclusions regarding the four inquiries mandated by the remand, we find, however, that the plaintiff should not be held to strict compliance to the procedural requirement that the International be named in the charge before the EEOC. The International is subject to the jurisdiction of this court and must contribute to the settlement with the plaintiff class.

I

Whether the International was actually named before the EEOC.

The remand opinion instructs this court initially to determine whether "plaintiffs, in fact, named the International in the charge to the EEOC." 562 F.2d 889. The Scalera

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[1] Trial on the issue of the liability of the International was held before the Honorable Ralph F. Scalera. Appeal was taken from the post-trial opinion filed by Judge Scalera on April 29, 1976. *Glus* v. *G. C. Murphy Co.*, C.A. No. 71-264 (W.D. Pa., filed April 29, 1976) (Scalera Opinion). Subsequent to the filing of the Scalera Opinion, Judge Scalera resigned his commission as district judge. The remand of this case was thus reassigned to us. A hearing was therefore necessary. Although we give deference to the findings of Judge Scalera, we have found no reason to diverge from those findings after an independent consideration of the evidence adduced at the hearing and the record as a whole. Judge Scalera had found the International liable for one-half of the damages which Murphy had agreed to pay the plaintiff class on Murphy's claim for contribution.

opinion was found by the Court of Appeals inconclusive as to this fact. Judge Scalera found that "[w]hether the International was, in fact, named in the amendment cannot be conclusively determined from the record." Slip op. at 9. No evidence was adduced at the September 12th hearing which would materially after the conclusion.

The actual amended charge before the EEOC does not include the formal name of the International. Only one union is named, the "Retail, Wholesale, and Department Store Union, Local 940, AFL-CIO." Although the acronym AFL-CIO is properly a part of the International's name, the acronym could refer to either the Local or the International union. Given the fact that the charged union title includes "Local 940," it is most reasonable to conclude that the local is referred to by the charge. The EEOC interpreted the charge in this manner. The International was not made a party to conciliation and no right to sue letter issued against the International. In light of all these facts, it must be concluded that the International was not "in fact . . . named in the charge to the EEOC."

II

Whether the plaintiff should be held to strict compliance with the requirement that the International be named before the EEOC.

Since we find that the International was not actually named in the charge before the EEOC, we turn to the second question posed by the remand: whether the International may nonetheless be retained as a defendant in this action. The Court of Appeals directs our consideration to four issues:

> "1. Whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint;
>
> 2. Whether, under the circumstances, the interests of a named are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and

compliance it would be unnecessary to include the unnamed party in the EEOC proceedings;

3. Whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party;

4. Whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party."

Each issue will be individually discussed.

1. *Ascertainment of the role of the International.*

Murphy concedes that Joanne Glus, the class representative who authored the charge to the EEOC, knew of the International's involvement with the discriminatory acts alleged. She stated that she, in fact, intended to name both the International and Local 940 in the amended charge. An EEOC investigator advised the joining of both unions. The charge itself was, however, inadequately written. The evidence leads to a conclusion that the inadequacy of the charge was due to inadvertence, not lack of knowledge on the part of the charging party. This suggests exclusion of the International as a defendant.

2. *Similarity of Interests.*

The interests of the International and Local 940, a named party, are identical. Their liability arises out of the same acts. The principal discriminatory acts of the Local center about the acquiescence to discriminatory provisions of collective bargaining agreements with Murphy. The liability of the International is based on the same contracts.

The International initially was the certified bargaining representative of the employees at the Murphy warehouse in question. Soon after certification of the International, Local 940 was formed and became a signatory to the collective bargaining agreement. Thereafter, both the international representative and representatives of Local 940 were signatory to all collective bargaining agreements, including those complained of in this action. The representative of

the International for Western Pennsylvania served as the chief negotiator of the agreements and signed them as the International representative. Although the agreements do not name the International as a party to the agreements, the presence of the International representative as chief negotiator establishes the acquiesence of the International to the violations contained in the agreement.

Since the International's liability rests on the same ground as that of Local 940, the presence of the Local in the conciliation proceedings before the EEOC adequately protected the interests of the International.

3. *Actual Prejudice.*

The question of whether the International was actually prejudiced by plaintiffs' failure to name it is difficult to answer. The International argues that exclusion from conciliation is *eo ipso* actual prejudice. However, persuasive this argument may be, such a finding is inconsistent with the remand. In the usual EEOC case an unnamed party is excluded from conciliation. If we were to accept the argument of the International, actual prejudice would automatically be present, and no issue as to prejudice could ever arise as a matter of law.

We consider the question of actual prejudice to require a finding whether, had the unnamed party been named and made a party to conciliation, conciliation could have been effective. This is, of course, a difficult finding to make, for the effect of another party on negotiations involves many subtle elements, and the judgments of many persons.

Despite problems attendant to the issue, it is probable that even if the International had been a party to conciliation, settlement would not have been reached. During conciliation the largest offer made by Murphy was $50,000.00. The lowest demand by plaintiffs was $500,000.00. It is unlikely the International would have contributed more than Murphy to the settlement. It was only after this action was brought and a class certified that Murphy was able to settle

the claim to which the International is subject. The settlement was made for $548,000.00 at a time when the International was a party. The International did not offer to enter into that settlement. In light of these facts, the exclusion of the International from conciliation did not result in actual prejudice.

4. *Representations of the International to plaintiffs that named parties would represent the International.*

The record evidences no direct statement by any International representative that the International was to be represented by Local 940 for purposes of plaintiffs' complaints. The practice of the International was, however, to use Local 940 as its representative in relations with the members of the Local. The relationship between the Local and International was a close one. The International representative [2] served the Local as a negotiator and participated in the grievance procedure. When secretarial help was needed by the Local, it was often performed by the secretary of the International representative. The nature of the relationship between the International and Local was such that a member of the Local could have concluded that a charge against the Local would also include the International.

III

Analysis and Conclusions

We have found that three of the considerations posed by the Court of Appeals, when applied to the facts presented here, suggest the propriety of retaining the International as a defendant and one suggests exclusion. The remand opinion is silent with respect to the weight to be accorded each consideration. We thus must consider the absence of No. 1 in light of the central issue for determination.

The controlling issue, of which the four considerations

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[2] There was an International representative stationed in Pittsburgh by the name Burberg. He was an advisor to the Local.

are only elements, is whether a plaintiff should be held to strict compliance with the requirement that the International be named in the charge. Considerations No. 1 (knowledge of the International's role) and No. 4 (statements by the International indicating that the Local represented it), *supra,* as posed by the Court of Appeals, appear to focus upon whether the failure to name the defendant should be excused. Considerations No. 2 (similarity of interests) and No. 3 (actual prejudice), *supra,* appear to go to the question of whether the defendant was prejudiced by not being named in the charge. The four considerations, therefore, appear to go to only two questions; whether plaintiffs' failure to name a defendant is excusable, and whether the defendant is prejudiced by not being named. Proof of justifiable excuse and no prejudice would appear to be necessary before the International could be made liable in this action. In terms of the considerations posed by the Court of Appeals, for Murphy to prevail, No. 1 or No. 4 should be found, as well as No. 2 or No. 3. Since we have found No. 3 (no actual prejudice) and No. 2 similarity of interests) to be present as well as No. 4 (statements concerning representation) Murphy's should therefore prevail.

BARRON P. MCGUNE
UNITED STATES DISTRICT JUDGE

Dated: February 14, 1979.
cc: Counsel of record.

APPENDIX E

United States Court of Appeals

FOR THE THIRD CIRCUIT

JOANNE GLUS, et al.,

Plaintiffs

v.

G. C. MURPHY,
Defendant, Appellee-Cross Appellant

AND

RETAIL, WHOLESALE AND DEPARTMENT STONE UNION, LOCAL 940

Defendant

AND

INTERNATIONAL UNION OF WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,
Defendant, Appellant-Cross Appellee

Nos. 76-1864 and 76-1865

Argued February 22, 1977
Decided August 8, 1977
As Amended November 9, 1977

Female employees brought sex discrimination class action under the Civil Rights Act of 1964 against employer and local and international unions. A cross claim was filed by the employer against unions. Following approval of a settlement between plaintiffs and the employer, trial was held on the remaining issue of contribution. An appeal and cross appeal were taken from a judgment entered by the United States District Court for the Western District of Pennsylvania. The Court of Appeals, Biggs, Circuit Judge, held that (1) the district court did not have ancillary jurisdiction over the cross claim by employer against the inter-

national union (which plaintiffs had failed to charge before the Equal Employment Opportunity Commission), and (2) in determining whether plaintiffs should have foreseen at the EEOC stage the necessity and desirability of adding the international union as a party, the factors to be considered included whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of filing the EEOC complaint; whether, under the circumstances, the interests of a named party were so similar to the unnamed party that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceeding; whether its absence from the proceedings resulted in actual prejudice to its interests; and whether the unnamed party in some way represented to the complainant that its relationship with the complainant was to be through the named party.

Remanded for further proceedings.

1. Civil Rights 38

Filing requirements set forth in Title VII of the Civil Rights Act of 1964 are jurisdictional. Civil Rights Act of 1964, § 706(e) as amended 42 U.S.C.A. § 2000e-5(f)(1)..

2. Civil Rights 38

A charge against a party must be filed with the Equal Employment Opportunity Commission before an action in the district court can be commenced. Civil Rights Act of 1964, § 706(e) as amended U.S.C.A. § 2000e-5(f)(1).

3. Federal Civil Procedure 40

Federal Rules of Civil Procedure cannot be used to expand the subject matter jurisdiction of the district courts. Fed. Rules Civ.Proc. rule 82, 28 U.S.C.A.

4. Federal Courts 24

Although subject matter jurisdiction of the district courts cannot be expanded by the federal rules, the doctrine

of ancillary jurisdiction may be applied to a cross claim or impleader. Fed.Rules Civ.Proc. rules 13(g), 14, 82, 28 U.S.C.A.

5. Federal Courts 20

Ancillary jurisdiction is based on the concept that once the court has jurisdiction over a claim it may also adjudicate claims arising from the same transaction or occurrence without an independent basis for jurisdiction.

6. Federal Courts 24

District court, in sex discrimination class action brought under the Civil Rights Act of 1964 against employer and local and international unions, did not have ancillary jurisdiction over cross claim by employer against international union (which plaintiffs had failed to charge before the Equal Employment Opportunity Commission), since grave doubt exists as to whether ancillary jurisdiction may be extended to situations where there is no independent basis for subject matter jurisdiction over a party, and since the instant case did not present either of the typical situations for ancillary jurisdiction. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

7. Federal Courts 941

When a district court fails to make a necessary finding of fact, the Court of Appeals will be required to remand the case unless an alternative means to reach a full resolution is available.

8. Civil Rights 38

Jurisdictional requirements for bringing suit under Title VII of the Civil Rights Act of 1964 should be liberally construed. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

9. Civil Rights 38

In enacting Title VII of the Civil Rights Act of 1964,

Congress could not have intended that a person filing charges should accurately ascertain, at the risk of later facing dismissal of his or her suit, at the time the charges were made, every separate entity which in some way may have violated Title VII. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

10. Civil Rights 41

In determining whether employee, whose Equal Employment Opportunity Commission complaint charged employer and local union with sex discrimination, should have foreseen the necessity of adding international union as a party, factors to be considered were whether the unnamed party's role could through reasonable effort by complainant be ascertained at time of filing EEOC complaint; whether a named party's interests were so similar to the un-named party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; whether its absence resulted in actual prejudice to its interests; and whether the unnamed party in some way represented to complainant that its relationship with the complainant was to be through the named party. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

Robert Markewich, Markewich, Rosenhaus, Markewich & Friedman, New York City, for Joanne Glus et al., plaintiffs.

J. M. Maurizi, Balzarini, Walsh & Maurizi, Pittsburgh, Pa., for appellant-cross appellee, Intern. Union of Wholesale and Dept. Store Union, AFL-CIO.

Robert H. Stevenson, Anderson, Moreland & Bush, Pittsburgh, Pa., for appellee-cross appellant, G. C. Murphy Co.

Before ADAMS, BIGGS and HUNTER, Circuit Judges.

OPINION OF THE COURT
BIGGS, Circuit Judge.

This case raises a number of difficult questions regarding

contribution between the defendants in actions brought under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § § 2000e *et seq.* and the Equal Pay Act of 1963 (Equal Pay Act), 29 U.S.C. § § 201 *se seq.*

I. FACTS

The appeal and cross-appeal before us began as a class action brought by 19 named plaintiffs on behalf of all females in the employ of appellee-cross appellant G. C. Murphy Co. (Murphy) since 1964. Named as defendants were Murphy; the Retail, Wholesale and Department Store Union, Local #940 (Local 940); and the International Union of Wholesale and Department Store Union, AFL-CIO (International). In the first count of their complaint plaintiffs alleged, *inter alia*, that Murphy, Local 940, and the International had violated Title VII by maintaining under collective bargaining agreements entered into by the defendant labor organizations and Murphy separate job classifications, pay scales, and seniority systems for male and female employees of Murphy's McKeesport, Pennsylvania, warehouse.

In the second count of their complaint plaintiffs alleged that Local 940 and the International violated their duty of fair representation imposed upon them by the National Labor Relations Act and the Labor-Management-Relations Act in acquiescing and joining in the discriminatory practices which formed the basis of their Title VII complaint.

After Murphy, the International and Local 940 filed answers to the plaintiffs' complaint. Murphy filed a cross claim on August 19, 1971, for a judgment that if there be liability to the plaintiffs the defendant labor organizations were solely liable and that judgment be entered for Murphy over and against Local 940 and the International for any amount recovered by the plaintiffs against Murphy. The basis of Murphy's cross claim was that the allegedly discriminatory practices were the result of demands made by the unions in the course of collective bargaining and were acceded to in good faith by Murphy.

On July 14, 1972 the district court granted class status and certified the class as being "all females who were employed at the G. C. Murphy Company warehouse and who were included in the unit covered by the labor union contracts at any time between July 1, 1965 and June 30, 1971." At the same time the court approved a notice of settlement between Murphy and the plaintiffs. The court further ordered a hearing concerning the proposed settlement on October 2, 1972 which "any person may attend to inform the Court of any matter pertaining to these proceedings. . . ."

The terms of the settlement provided that Murphy would pay $548,000 to the plaintiffs and an additional $100,000 in attorneys' fees to plaintiffs' counsel. The payment was to be made in three installments with 6 per cent interest on the deferred payments. Also, pursuant to the settlement agreement plaintiffs amended their complaint to include a claim only against Murphy for violation of the Equal Pay Act of 1963. (68a). $100,000 of the $548,000 settlement was allocated to the Equal Pay Act claim. The remaining $448,000 was allocated to the Title VII claim.

A hearing was held on October 2, 1972 concerning the proposed settlement. Present at the hearing, in addition to plaintiffs' and Murphy's counsel, was Joseph M. Maurizi, Esquire, a member of the bar, representing both Local 940 and the International. The Court inquired whether there was any objection to the settlement. Mr. Maurizi did not object.

Murphy proceeded on its claim for contribution, and ultimately settled its claim against Local 940 for $4,146, the total amount in Local 940's treasury.

Trial was held on the remaining issue, Murphy's claim for contribution against the International and Teamster's Local 249.[1]

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[1] Teamster's Local 249 was the successor collective bargaining agent of Local 940. A class action was brought against Murphy

Upon the conclusion of the trial the district court found both Murphy and the International equally responsible for the complained of sex discrimination. The district court based its finding on evidence that the International participated in the collective bargaining of the 1965 and 1968 contracts through one Burberg, the International Representative. Burberg, as the "International Representative" signed the collective bargaining agreement;[2] and also participated in Local 940's affairs including grievance procedures. With regard to Burberg's participation in the negotiations of the discriminatory agreements the district court found:

> "Burberg may be appropriately characterized as the most experienced person on the Union's side of the 1965 and 1968 negotiating table. (Tr. 204) [410a]. It may also be concluded that because Local 940 did not have an attorney who participated in the 1965 and 1968 negotiations, the union turned to Burberg for counseling on the legality of the negotiations. (Tr. 206, 268) [413a, 475a]. The attorney counseling Murphy at the contract negotiations occasionally met privately with Burberg to discuss union matters. (Tr. 206) [413a]. And during the negotiations, union officials would privately consult Burberg for his opinion on the various aspects of the negotiations (Tr. 268) [475a], and Burberg's opinion generally was adopted by the union at the negotiation table."

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and Local 249 for *inter alia*, sex discrimination in violation of Title VII based on the failure to retroactively rectify disparate pay scales between Murphy's male and female employees and Local 249's refusal to accept Murphy's offer of retroactive parity. Murphy's setlement with the plaintiffs in the instant case included a settlement with the plaintiffs in the action involving Title VII. The district court joined the two cases for the purpose of Murphy's action for contribution. There was a judgment for Murphy (124a *et seq.*). Local 249 has appealed. Murphy was cross-appealed. For disposition of this case, see order in *Denicola v. G. C. Murphy*, 562 F.2d 889 (3d Cir., filed Aug. 8, 1977).

[2] In addition to Burberg the contracts were signed by representatives of Murphy and Local 940.

141a-142a.[3] The district court further found Burberg to be acting within the scope of his agency or representative status of the International. 142a-145a.

The court determined that Murphy and the Labor organizations, the International and Local 940, which had settled, were equally at fault, and so apportioned the Title VII share of the settlement with the plaintiffs. 176a.[4] The district court excluded the $100,000 from the amount to be allocated for contribution ruling that a labor organization could not be liable under the Equal Pay Act. The court found the settlement between Murphy and the plaintiffs to span a period of time beginning July 1, 1965 and ending June 30, 1971, a period of 72 months. 177a. The court found the union collectively liable for $224,000, 50% of the plaintiffs' $448,000 Title VII recovery. *Id.* The International's share of the responsibility for the Title VII recovery was $^{67}/_{72}$ since it was for 67 months of the 72 month period that the International and Local 940 represented Murphy's employees. *Id.* Thus, the International's liability for the Title VII claim was $208,444, or $^{67}/_{72}$'s of $224,000. *Id.* For the purpose of contribution attorneys' fees were apportioned. The district court determined that of the $100,000 attorneys' fees $81,752 was attributable to the Title VII claims. This was done by taking the ratio of the Title VII recovery, or $448,000 to total recovery, or $548,000, and the total amount of attorneys' fees:

$$\frac{\text{Title VII Recovery (\$448,000)}}{\text{Total Recovery (\$548,000)}} = \frac{\text{Title VII Attorneys' Fees}}{\text{Total Attorneys' Fees (\$100,000)}}$$

Id. The International's contribution to the attorneys' fees for the Title VII recovery was based on the same percentage, $^{67}/_{72}$ used to determine its Title VII contribution.

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[4] In its brief Murphy challenged the district court's allocation of $100,000 of the $548,000 as arbitrary. At oral argument in this court Murphy abandoned this position.

[3] Judge Scalera's opinion has not been reported for publication.

Thus, the court below found the International liable for $38,039, 67/72's of $40,876, 50% of the Title VII attorneys' fees, or $38,039. Credited against the International's liability was the $4,146 settlement Murphy received from Local 940. A judgment in favor of Murphy and against the International was entered in the sum of $242,337 on April 29, 1976.[5]

II. ISSUES OF LAW

A. Introduction

The International in its appeal and Murphy in its cross-appeal have raised a number of questions regarding the deposition of the case in the district court.

The first issue raised on appeal by the International concerns the question of whether the district court had subject matter jurisdiction over Murphy's claim for contribution from the International under Title VII. The International contends that since it had not been named by the plaintiffs in their complaint to the Equal Employment Opportunity Commission (EEOC) the district court lacked subject matter jurisdiction to proceed with Murphy's cross-claim. This problem recently came to the attention of this Court in *Canavan v. Beneficial Finance Corp.*, 553 F.2d 860 (3d Cir., filed Mar. 23, 1977). Although the *Canavan* Court discussed various theories of jurisdiction it was not able on the record before it to reach full resolution of the jurisdictional issue.

Murphy in its cross-appeal has raised the issue of whether the district court erred in refusing to allow contribution for its liability under the Equal Pay Act of 1963, 29 U.S.C. §§ 201 *et seq.*

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[5] A judgment in favor of Murphy and against Teamster's Local 249 for the sum of $18,393 was also entered. The $18,393 represented contribution of $15,556 for Title VII violations and $2,837 in attorneys' fees. $15,556 constitutes 5/72 of 50% of the Title VII settlement, while $2,837 represents 5/72 of 50% of the $100,000 attorneys' fees which were apportioned to the Title VII recovery. *See Denicola v. G. C. Murphy Co., supra.*

B. Jurisdictional Issue

[1, 2] We begin with the well established doctrine that the requirements set forth in 706(f)(1) of Title VII [6] are jurisdictional. See *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 n. 8 (3d Cir.), *cert. denied*, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). It is also established doctrine that a charge must be filed against a party with the EEOC before an action in the district court can be commenced. *Id.*; *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1092-93 (6th Cir. 1974); *Le Beau v. Libby-Owens-Ford Co.*, 484 F.2d 798, 799 (7th Cir. 1973); *Textile Workers, Local 179 v. Federal Paper Stock Co.*, 461 F.2d 849, 851 (8th Cir. 1972); *Jefferson v. Peerless Pumps Hydrodynamic*, 456 F.2d 1359 (9th Cir. 1972); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970).

The International argues that the district court was without jurisdiction to hear Murphy's cross-claim for contribution because the plaintiff failed to charge the International before the EEOC. Murphy disputes this contention on three grounds. 1) The International was, in fact, named in the plaintiff's charge to the EEOC; 2) It was unnecessary for the plaintiffs to name the International because a charge was filed against the International's agent Local 940; and

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[6] Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1) provides: "If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent . . . named in the charge. . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if . . . the Commission has not filed a civil action under this section or . . . entered into a conciliation agreement . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought *against the respondent named in the charge* (A) by the person claiming to be aggrieved. . . ." (Emphasis added).

3) The Federal Rules of Civil Procedure confers jurisdiction upon the district court to hear Murphy's cross-claim.

We turn first to the opinion of the district court. The district court held that it had subject matter jurisdiction over Murphy's cross-claim for contribution against the International relying upon *Torockio v. Chamberlain Mfg. Co.*, 51 F.R.D. 517 (W.D. Pa. 1970), written by then District, now Circuit, Judge Weis.

In *Torockio,* plaintiff charged in a complaint to the EEOC that her employer and union local engaged in sex discrimination. She ultimately brought suit in district court against the local and the employer. The employer sought to add either under F.R. Civ.P. 14 or 19 as a defendant the international union which was signatory to the labor contract which was an important aspect of the plaintiff's case. The International, through the Local, objected to its addition into the proceedings because it had not been named in the complaint to the EEOC. The district court, although recognizing the line of cases holding that plaintiff cannot sue under Title VII unless the defendant had been charged in a complaint to the EEOC, nevertheless ordered the International joined.

The court noted:

> "There can be no quarrel with the desirability of such a procedure or the necessity of enforcing compliance by the parties. The situation presented here, however, is somewhat different. It is not the plaintiffs who seek to join the additional party; it is one of the defendants which was not given or could not be given such a right before the Commission. In essence, the question is whether the Civil Rights Act by implication deprives the defendants of their very valuable rights under the Federal Rules of Civil Procedure to have a resolution of all facets of the dispute in one proceeding—the 'just, speedy and inexpensive determination of every action' as Rule 1 phrases it.
>
> "We find nothing in the Civil Rights Act which would supplant the Rules of Civil Procedure in suits under the Act which are in the courts.

* * * * * *

"We conclude, therefore, that there is no conflict between the jurisdictional requirement of the Act requiring the plaintiff to name all potential defendants as respondents in the administrative proceedings and the Rules of Civil Procedure which allow the defendants to bring appropriate parties into the case once suit has been filed in the district court."

Id. at 518-519.

The district court in the instant case reasoned that if the plaintiffs failed to name the International in its complaint under *Torockio* Murphy could have impleaded the International. The court noted that Murphy, like the employer in *Torockio,* was unable to join the International as a party before the EEOC, and concluded, "The fact that the International may have not been named before the EEOC does not preclude this court from exercising subject matter jurisdiction over it where its joinder could be accomplished through Rule 14 if it had not been made as a defendant and, more importantly, where its presence is essential to the disposition of the remaining issue in this lawsuit—Murphy's right of contribution from the International."[7]

[3] It seems almost unnecessary to state that the Federal Rules of Civil Procedure cannot be used to expand the subject matter jurisdiction of the district courts. *See* F.R. Civ.P. 82 which provides that the Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts . . ."[8] We have great difficulty with a statutory scheme of federal subject matter jurisdiction being construed as to make it consistent with the Federal Rules of Civil Procedure. We recognize, as did Judge Weis in his opinion in *Torockio*, that there is a great interest in "a resolution of all facets of the dispute in one proceeding." *Torockio, supra,* at 519. However, as the Supreme Court has cautioned:

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[7] Opinion of the district court, 138a.

[8] *Cf. FDIC v. Greenberg,* 487 F.2d 9, 12 (3d Cir. 1973) (F.R. Civ.P. 4(e) does not limit federal venue for quasi-in-rem actions).

> " 'The value of efficiency in the disposition of law suits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction.' "

Aldinger v. Howard, 427 U.S. 1, 96 S.Ct. 2413, 2420, 49 L.Ed.2d (1976), quoting *Kenrose Mfg. Co. v. Fred Whitaker Co.,* 512 F.2d 890, 894 (4th Cir. 1972).

At oral argument Murphy's counsel attempted to characterize the district court's jurisdiction over its cross claim as "ancillary jurisdiction." We take it that counsel considered that there was jurisdiction as between Murphy and the International or the plaintiffs and the International because it arose from the same transaction as did the plaintiffs' claim against Murphy for which there was subject matter jurisdiction.

[4] Murphy's contention seems to be an attempt to deduce a theoretical foundation for finding subject matter jurisdiction without direct reliance upon the Federal Rules. Although subject matter jurisdiction cannot be expanded by the Federal Rules it is well established that the doctrine of ancillary jurisdiction may be applied to a cross-claim brought pursuant to F.R.Civ.P. 13(g)[9] or impleader under F.R.Civ.P. 14.[10]

[5] Ancillary jurisdiction is based upon the concept that once the court has jurisdiction over the claim it may also adjudicate claims arising from the same transaction or occurrence without an independent basis for jurisdiction.

[6] We cannot at this time rest our decision on ancillary jurisdiction for two reasons. First, in *Aldinger v. Howard, supra,* the Supreme Court cast grave doubts whether ancillary jurisdiction may be extended to situations where there is no independent basis for subject matter jurisdiction over

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[9] *See* 6 C. Wright & A. Miller, Federal Practice and Procedure § 1433, at 177 (1971).

[10] *See id.* § 1444, at 215.

a party.[11] We recognize, however, that *Aldinger* did deal with pendent jurisdiction and could be constructed as being limited to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) contexts. Second, this case does not present either of the typical situations for ancillary jurisdiction. First, it was the plaintiffs that named the International in their complaint and not Murphy impleading under Rule 14. Second, if the International was improperly brought into the action by the plaintiffs, it is doubtful whether the International could be considered a "co-party" for the purposes of F.R.Civ.P. 13(g).[12]

We cannot accept ancillary jurisdiction as applicable in the instant case and in our opinion the Federal Rules of Civil Procedure cannot expand the jurisdiction of the district court. It is necessary, therefore, to consider Murphy's contention that the district court had subject matter jurisdiction over its cross-claim against the International on the grounds that the International had, in fact, been named in the plaintiffs' complaint to the EEOC. Murphy also argues that it was unnecessary for the plaintiffs to name the International because a charge was filed with the EEOC against the International's agent Local 940.

We first address ourselves to Murphy's contention that, in fact, the International had been named in the plaintiffs' complaint to the EEOC. In its opinion, the district court discussed this issue but was unable to reach a satisfactory

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[11] *Cf. Herbst v. International Telephone and Telegraph Corp.*, 72 F.R.D. 85, 93 (D.Conn. 1976).

[12] This Court has, in the past, limited the reach of ancillary jurisdiction. *See Seyler v. Steuben Motors, Inc.*, 462 F.2d 181 (3d Cir. 1972) (Per Curiam) (ancillary jurisdiction not available to allow Pennsylvania plaintiff to bring suit against non-diverse defendant). *See also Johnson v. Better Materials Corp.*, 556 F.2d 131 (3d Cir., filed Nov. 23, 1976) (Per Curiam), *cert. denied*, 430 U.S. 967, 97 S.Ct. 1649, 52 L.Ed.2d 359 (U.S., Mar. 19, 1977) (New Jersey plaintiff may not bring action against non-diverse third-party defendant).

resolution of the dispute, deciding instead that it was unnecessary for the International to be charged.

[7] The district court made no finding of fact as to whether the International was named in the charge to the EEOC. (132a). It is well established appellate procedure that when a district court fails to make a necessary finding of fact the Court of Appeals will be required to remand the case unless an alternative means to reach a full resolution is available. *See* 5A Moore's Federal Practice, ¶ 52.06[2]. Since, as indicated above, this Court disagrees with the district court's resolution of the jurisdictional issue, we believe that the factual dispute should be resolved by the district court, unless other grounds set out hereinafter suffice.

Murphy next argues that it was unnecessary for the plaintiffs to name International in a complaint to the EEOC because they filed a charge against Local 940, who, Murphy contends is an agent of the International.

The district court reached Murphy's argument based on the agency theory but concluded it was unable to base jurisdiction on agency. *See* 133a-134a. The district court stated that it would not be necessary to name a party before the EEOC if 1) there was substantial, if not complete identity of the parties, or 2) the unnamed had an opportunity to actually engage in the conciliation process. The court found neither exception present in the instant case.[13] While we can perceive no fault in the findings, we conclude that sole reliance upon such factors is too strict. *See Canavan v. Beneficial Finance Corp., supra.*

[8] We believe that the jurisdictional requirements for bringing suit under Title VII should be liberally construed. *See Canavan v. Beneficial Finance Corp., supra,* citing

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[13] In the instant case the district court found that the International did not have an opportunity to engage in conciliation. *See* 143a. Murphy argues in its brief that the International was directly notified of the EEOC charge. *See* Appellee's brief at 21. The record adequately supports the finding to the contrary by the district court. *See* 427a.

Evans v. Sheraton Park Hotel, 164 U.S.App.D.C. 86, 503 F.2d 177 (1974). In *Evans* it was stated:

> "We do not believe that the procedures of Title VII were intended to serve as a stumbling block to the accomplishment of the statutory objective. To expect a complainant at the administrative stage, usually without aid of counsel, to forsee and handle intricate procedural problems which could arise in subsequent litigation, all at the risk of being cast out of court for procedural error, would place a burden on the complainant which Congress neither anticipated nor intended."

Id. at 183.

The purpose of requiring an aggrieved party to resort first to the EEOC is twofold: to give notice to the charged party and provide an avenue for voluntary compliance without resort to litigation. *See generally, Le Beau v. Libbey-Owens-Ford, supra; Fekete v. U.S. Steel Corp.,* 424 F.2d 331, 334 (1970); *Bowe v. Colgate-Palmolive Co.,* 416 F.2d 711 (7th Cir. 1969).

[9] As the *Evans* court noted much of the initiation of charges with the EEOC is done by laymen,[14] as was true in the instant case.[15] We cannot believe Congress intended that a person filing charges should accurately ascertain, at the risk of later facing dismissal of their suit, at the time the charges were made, every separate entity which in some way may have violated Title VII.

[10] In the instant case, Glus in her complaint to the EEOC charged her employer and her local union with sex discrimination. Whether she could foresee at that stage in the proceedings the necessity and desirability of adding the International we cannot say. It would seem reasonable from the standpoint of the complainant that if voluntary compliance could not be obtained through the EEOC from her employer or her local union the addition of the International would make little, if any, difference. It should be

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[14] *See Canavan v. Beneficial Finance Corp., supra.*

[15] *See* 734a, 738a-739a.

noted that Article VIII, Section 1 of the International's Constitution provides, in part, "The membership of the Retail, Wholesale and Department Store Union shall function through locals chartered by International Executive Board . . ." [16] Of course, we do not suggest that where it can reasonably be expected full compliance will not be required. Factors which we believe the district court should look to are 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party. Consideration of these factors should be initially in the hands of the district court. The goal of conciliation without resort to the already overburdened federal courts is of great importance and should not be lost. However, equally important is the availability of complete redress of legitimate grievances without undue encumbrance by procedural requirements especially when demanding full and technical compliance would have no relation to the purposes for requiring those procedures in the first instance. In our view the district court should evaluate the failure to name the party before the EEOC by consulting the four factors discussed *supra*.

We, therefore, remand the case at bar to the district court. The district court on remand should reconsider Murphy's contention that the plaintiffs in fact named the International in the charge to the EEOC. If the court concludes that it is unable to determine whether the International had in fact been named, or it finds that International had

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[16] International's Exhibit E, at 33.

not been named in the charge, it should determine, in a manner consistent with the four factors we have outlined above, whether compliance was unnecessary. In respect to these alternatives the court may receive further evidence if it shall deem such course appropriate.

C. Equal Pay Act Issue

In its cross-appeal Murphy has made numerous contentions regarding the district court's refusal to find the International liable for contribution for violation of the Equal Pay Act, 29 U.S.C. § 206(d). Murphy has raised the same contentions in its cross-appeal in *Denicola v. G. C. Murphy Co., supra,* decided this day. In light of our remand in this case and our opinion in *Denicola,* we deem it unnecessary to comment further.

In view of our disposition, it would not be appropriate to address the other contentions raised by the parties, at least at this time.

III. CONCLUSION

The case will be remanded to the district court for further proceedings consistent with this opinion.

APPENDIX F

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOANNE GLUS, et al.,

Plaintiffs

Civil Action No. 71-264

THE G. C. MURPHY COMPANY, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCAL #940 AND INTERNATIONAL UNION OF WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,

Defendants

ROSEMARIE DENICOLA, et al.,

Plaintiffs

Civil Action No. 72-172
(Filed April 29, 1976)

v.

THE G. C. MURPHY COMPANY AND THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND GENERAL TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION No. 249,

Defendants

OPINION

SCALERA, J., April 29, 1976

I

The plaintiff, Joanne Glus, and other named plaintiffs sued on behalf of themselves and a class of all other female persons who were employed at the G. C. Murphy Company (Murphy) warehouse in McKeesport, Pennsylvania. In Count I, plaintiffs alleged that defendant Murphy and

defendants Retail, Wholesale and Department Store Union, AFL-CIO (International Union), Retail, Wholesale and Department Store Union, Local No. 940 (Local 940), International Brotherhood of Teamsters, Chauffeurs and Helpers of America (Teamsters), and General Teamsters, Chauffeurs and Helpers, Local Union No. 249 (Local 249) discriminated against the plaintiff class on the basis of sex in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.*

Count II alleges that the defendant unions breached the duty of fair representation imposed on them by the National Labor Relations Act, and the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 161, *et seq.*, by acquiescing and joining in the discriminatory practices.[1] In an amendment to the original complaint, plaintiffs aver that defendant Murphy violated the Equal Pay Act section of the Fair Labor Standards Act of 1938 (as amended), 29 U.S.C. § 206(d)(1), and was therefore liable under 29 U.S.C. § 216(b).

It is undisputed that the 1965 and 1968 collective bargaining contracts for Murphy employees contained provisions establishing separate male and female seniority lists prohibiting transfers from either seniority list to the other, establishing separate male and female job classifications, prohibiting transfers between the male and female job classifications, and providing a higher rate of pay for the male job classifications than the female classifications.

In a "cross complaint" filed August 19, 1971 by Murphy against defendants International and Local 940, Murphy averred *inter alia* that during the 1965 contract negotiations, the unions' negotiating committee demanded that the female hourly employees at the company's warehouse be given a twenty-five pound weight limitation on their lifting

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[1] In 71-264, plaintiffs alleged in Count II that Murphy had breached its duty of fair representation. The court, in an opinion of July 29, 1971, dismissed Murphy from this count.

of objects in the warehouse, and that the company acceded to this demand and many other contract provisions which implemented the weight limitation in order to reach an agreement on the 1965 labor contract. Murphy also claimed that when the 1965 contract expired, the unions insisted that the weight limitations and the provisions implementing them be reinstated in the 1968 contract. Murphy again acceded to the unions' demands. Murphy averred that the weight limitation and the various implementing provisions are the provisions which plaintiffs in their complaint allege violate the Civil Rights Act. The cross-complaint further stated that the unions knew of the plaintiffs' grievances and failed to properly process them. Murphy demanded in its cross-claim that if judgment be entered for plaintiffs that an additional judgment should be entered holding that the unions are solely liable to plaintiffs, and in the alternative, if there were any finding of liability or judgment against Murphy, that judgment be entered for Murphy over and against defendants International and Local 940 for any amount recovered by plaintiffs against defendant Murphy.

On December 22, 1971, Murphy also filed a counter-claim against the plaintiff.

Upon plaintiffs' motion for a class action determination, and after consideration of an affidavit submitted by plaintiffs' counsel and counsel for defendant Murphy, in which they agreed that the cases were appropriate for class action certification under Rule 23(b)(3), Fed.R.Civ.P., this court ordered that the case proceed as a class action. Pursuant to Rule 23(c), the class was defined as "all females who were employed at the G. C. Murphy Company warehouse and who were included in the unit covered by the labor union contracts at any time between July 1, 1965 and June 30, 1971 who were employees for any period in excess of fifteen days or more in any one calendar month, excluding probationary employees who failed to complete their probationary period, and temporary employees." In the same order, the court approved the form and the manner of

publication of the notice of the proposed settlement between plaintiffs and defendant Murphy.[2] The notice also contained a provision which informed each class member of the necessity of "opting out" of the class and their right to object to the proposed settlement at a hearing set by the court for October 2, 1972.

The court on October 2, 1972, pursuant to a consent decree, approved the settlement between plaintiffs and defendant Murphy. By the terms of the settlement, plaintiffs received $548,000, which sum was divided proportionately according to a schedule among the class, and plaintiffs' counsel received an additional $100,000 in attorney's fees and expenses.[3] The decree further provided that the court's

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[2] Included within the notice was the stipulation by G. C. Murphy and the plaintiffs that because there was no evidence against the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the case against them was to be dismissed. Despite notice and opportunity therefor, no objection was filed by the other defendant unions.

[3] Under the title "Attorneys Fees, Return of Costs and Expenses," the consent decree specified:

> On or before November 15, 1972 G. C. Murphy Company shall tender the sum of $28,542.92 to counsel for Plaintiffs, Martin Lubow, Esquire, 808 Law & Finance Building, Pittsburgh, Pennsylvania 15219.
>
> Between January 1, 1973 and January 31, 1973, G. C. Murphy Company shall tender the sum of $28,542.92 to counsel for Plaintiffs, Martin Lubow, Esquire, 808 Law & Finance Building, Pittsburgh, Pennsylvania 15219.
>
> Between January 1, 1974 and January 31, 1974, G. C. Murphy Company shall tender the sum of $28,542.92 to counsel for Plaintiffs, Martin Lubow, Esquire, 808 Law & Finance Building, Pittsburgh, Pennsylvania 15219.
>
> On or before November 15, 1972, G. C. Murphy Company shall tender to Martin Lubow, Esquire, the sum of $5,000 reimbursement for secretarial, postage, photocopying and other expenses.
>
> On or before November 15, 1972, G. C. Murphy Company shall pay over to Joanne Glus the sum of $871.24 in com-

approval of the consent decree did not constitute an adjudication or finding that Murphy had committed to past discriminatory practices which violated 42 U.S.C. § 2000e, *et seq.*, or 29 U.S.C. § 216(b). The decree also provided that Murphy's counterclaim in Civil Action 71-247 against plaintiffs was dismissed and that Murphy's cross-claim against defendants Local 940 and the International along with Murphy's rights of contribution against Local 249 were preserved.[4]

On October 11, 1972, the court ordered that the schedule of the amounts and the times of the payments to be made to plaintiffs as part of the settlement be made a part of the consent decree of October 2, 1972. Under the schedule, each class member was to be paid in three equal installments the compensation for any monetary loss resulting from the alleged discrimination. The first installment was to be paid no later than November 15, 1972, the second, no later than January 31, 1973, and the third, no later than January 31, 1974.[5]

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pensation for direct expenses of Plaintiffs to be disbursed to those persons who contributed said amount and to pay any debts in connection with this case which are still outstanding.

On or before November 15, 1972, Joanne Glus and Rosemarie Adamcik, Plaintiffs, shall each be reimbursed for lost time, travel and other incidental expenses the sum of $2,750.00 by G. C. Murphy Company.

On or before November 15, 1972, G. C. Murphy Company shall pay to Dr. Anthony Nitko the sum of $3,000.00, being compensation for his services as statistician for Plaintiffs in the above case.

[4] The defendant unions stated at the hearing that they did not object to the amount of the settlement and legal fees.

[5] According to the terms of the notice to the class, which was approved by the court and published in the Pittsburgh Press on September 2, 1972, each deferred payment was to bear interest of six percent. The schedule of October 11, 1972 does not indicate which of the three equal installments is considered a "deferred payment," nor whether the three payments include interest, nor the total amount to be paid out if interest is included.

On October 27, 1972, Murphy filed a motion for summary judgment and/or contribution against the International and Local 940. The theory of this motion was that the unions (the International and Local 940) demanded, permitted and cooperated in the maintenance of the alleged discriminatory employment practices which plaintiffs alleged in their complaint, and therefore Murphy contends that the unions are solely liable, or jointly with Murphy, for the discrimination, and because the plaintiffs' claims against all the defendants have been dismissed as a result of the settlement paid out by Murphy, it is only equitable that the unions pay over to Murphy the cost of the settlement.

On the same date, Murphy filed also a motion for contribution against Local 249 on the theory that Local 249 in effect permitted the discriminatory rate differential of the 1968 contract to continue until June 30, 1971 by rejecting the company's alleged offer during the 1971 labor contract negotiations to retroactively eliminate the differential to February 1, 1971. Murphy apparently demands from Local 249 that it bear one-half of that portion of the settlement package allocable to the discrimination which the female class experienced from February 1 to June 30, 1971.

Murphy's motions were followed by motions to dismiss and motions for summary judgment filed by the defendants. On November 7, 1972, the International and Local 249 filed respectively motions to dismiss Murphy's cross-claims and claims for contribution, and Local 940 filed a similar motion to dismiss on November 9, 1972. The court ordered briefs on the motions to dismiss as well as on Murphy's motions. While its motion to dismiss was still pending, on March 8, 1973, the International filed a motion for summary judgment on Murphy's cross-claim and claims for contribution. On June 22, 1973, a hearing was held on all the pending motions. At the hearing, the parties were given additional time to file supplemental points and authorities in support of their positions. On December 28, 1973, the court entered four separate orders denying (1)

Local 940's motion to dismiss, (2) Murphy's motions for summary judgment and/or contribution against the International, Local 249, and Local 940. (3) Local 249's motion to dismiss, and (4) the International's motion to dismiss and motion for summary judgment. Thereafter, the parties filed pretrial narratives. A pretrial conference was held in preparation for the non-jury trial of Murphy's claim for contribution against the three unions.

Immediately prior to the commencement of the trial, Murphy and Local 940 reached an agreement settling their disputed claim for the total amount (approximately $4,000) in the union's treasury. The settlement did not require Local 940 to expressly admit to any liability to Murphy. Neither the International nor Local 249 objected to the settlement. The court approved the settlement. Murphy's claims of contribution against the International and Local 249 proceeded to trial.

The transcript was filed. The parties submitted their proposed findings of fact and conclusions of law supported by briefs and reply briefs.

II

The International raised a jurisdictional issue in its pretrial motions and it has asserted the issue in its post-trial briefs. The International argues that the court lacks subject matter jurisdiction over it because it was not named as a respondent in plaintiffs' charges filed with the Equal Employment Opportunity Commission (EEOC), as required by § 706(f)(1) of the Civil Rights Act of 1964 or Title VII, 42 U.S.C. § 2000e-5(f)(1). Murphy does not dispute that the general rule is that a plaintiff may not sue a party in federal court for violations of the Act unless the party was named as a respondent before the EEOC. It has been uniformly held that the filing of timely charges of employment discrimination with the EEOC is a jurisdictional prerequisite. McConnell Douglas Corp. v. Green, 411 U.S. 792, 798, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973);

Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 246, n. 8 (3d Cir. 1975), *vacated on other grounds,* 44 U.S.L.W. 4350 (March 23, 1976); LeBeau v. Libby-Owens-Ford Co., 484 F.2d 798, 799 (7th Cir. 1975).

A.

Murphy has advanced several arguments in opposition to the International's contention. Initially, Murphy claims that the International was named in the amended charge (Murphy Ex. 1 and International Ex. M) filed on September 9, 1969 by named plaintiff, Joanne Glus, with the EEOC.[6] The amended charge named as respondents Murphy and "Retail, Wholesale, and Department Store Union, Local 940" and then on the line immediately below there was typed "AFL-CIO." Murphy argues that the acronym "AFL-CIO" is part of the formal name of the International and not part of the name of Local 940. Murphy also cites the testimony of plaintiff Glus, in which she stated that upon the advice she received from EEOC investigator, Alfred Harris, she intended to name Local 940 and the International as respondents in the amended charge.

The most reasonable conclusion from the testimony and the various exhibits introduced at trial is that the acronym "AFL-CIO" is a part of the formal name of both Local 940 and the International. The formal name of the local union is "Retail, Wholesale and Department Store Union, Local 940, affiliated with the American Federation of Labor and Congress of Industrial Organizations." This is the manner in which Local 940 is described in the 1965 and 1968 collective bargaining agreements (International Ex. D, Murphy Ex. 8, and International Ex. C, Murphy Ex. 9). The name of the Local 940 is similarly described in its by-laws. (International Ex. C, p. 8, and International Ex. D, p. 3.) The formal name of the International is "Retail,

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[6] It is undisputed that the original charge filed on July 25, 1969 (International Ex. B) by Glus named only Murphy as respondent

Wholesale and Department Store Union, affiliated with the American Federation of Labor-Congress of Industrial Organizations and the Canadian Labour Congress." (International Union's Constitution of June 1970, International Ex. E, p. 6.) The designation "AFL-CIO" in the amended charge could therefore refer to either Local 940 or the International.

The International contends that it was not named because in paragraph 7 of plaintiff Glus' amended charge (the section of the charge in which the claimant is asked to describe the discriminatory acts), only Local 940 is specified as concurring in Murphy's sexually discriminatory employment practices. The International also argues that the court lacks subject matter jurisdiction over it because the jurisdictionally required right-to-sue letter from the EEOC, McDonnell Douglas Corp. v. Green, *supra*, gave plaintiffs permission to bring suit only against Murphy and Local 940.

Whether the International was in fact named in the amended charge cannot be conclusively determined from the record. As to the International's other point in support of its lack of jurisdiction contention, the evidence is that the EEOC's right-to-sue letter did not name the International. This omission, arguably, would deprive this court of subject matter jurisdiction of plaintiffs' suit against the International. However, under the factual context of this case, plaintiffs' failure to name the International and the EEOC's naming of only Local 940 and Murphy in the right-to-sue letter are not determinative of the question of the court's subject matter jurisdiction over the International.

Murphy has made several alternative arguments which assume arguendo that the International was not named in the charge.[7] The basic thrust of Murphy's brief is that the

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[7] The normal preliminary procedure under the Act would follow this sequence: the naming of party as a respondent in the

case *sub judice* is an exception to the general rule of law which requires compliance with the Act's two preliminary jurisdictional arguments, i.e., naming of defendants as respondent before the EEOC and receipt, subsequent to an unsuccessful attempt at conciliation, of EEOC's right-to-sue letter. A consideration of these alternative arguments is essential in determining the jurisdictional argument.

B.

Murphy argues that even if the International was not named in plaintiffs' amended charge, its agent, Local 940, was named and that constitutes sufficient notice to the International to comply with the purpose of the Act. In its brief, Murphy does not attempt to establish that an agency relationship in fact exists between Local 940 and the International. Murphy's argument on this point is apparently that the mere allegation of an agency relationship or an affiliation between the two union entities alone is enough to constitute sufficient compliance with the Act's preliminary procedures before the EEOC. The court therefore does not and need not decide in the context of this argument whether an agency relationship in fact exists between Local 940 and the International. In support of this proposition, Murphy cites the language of Taylor, et al. v. Armco Steel Corp., et al., 373 F.Supp. 885, 911 (S.D. Texas 1973), in which it was stated:

> The Local as an agent of the International was named as a respondent in the EEOC charges here, and is an adequate representative of the International's interests.

Immediately following the language above, the court qualified its statement:

> Even if the Court is mistaken in this regard, it is clear

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charge, EEOC notice to the respondent and consequent determination whether the charge is supported by probable cause, EEOC attempts to obtain voluntary conciliation, if conciliation fails, the EEOC issues the charging party a right-to-sue letter. A timely suit may then be filed against named party in federal court.

> as stated in [United States v. Chesapeake and Ohio Ry. Co., 471 F.2d 582, 592 (4th Cir. 1972)] that the international could be added as a party even at this late date if necessary to effectuate the decree of relief.

This case does not stand, as Murphy contends, for the proposition that the mere allegation of an agency relationship alone constitutes sufficient notice to the principal unnamed in the EEOC charge so as to comply with the general rule.

Murphy also cites Sokolowski v. Swift & Co., 286 F.Supp. 775, 782 (D. Minn. 1968), in support of its position. However, this case does not advance the agency argument either, since the court concluded that while the existence of an agency relationship where one party named in the EEOC charge carries out the plan of another unnamed party to effect a discriminatory practice may be enough to cure a failure to name the principal in the EEOC charge, the mere affiliation between an antonomous local and its international union was insufficient to cure the failure to name the international in the charge.

Contrary to Murphy's contention, the agency theory has generally been rejected where considered. Jamison v. Olga Coal Co., 335 F.Supp. 454 (S.D. W.Va. 1971); Butler v. Local No. 4 and Local No. 269, Laborers' Int'l. Union, 308 F.Supp. 528, 530-31 (N.D. Ill. 1969); Cox v. U.S. Gypsum Co., 284 F.Supp. 74 (N.D. Ind. 1968), and Scott v. University of Delaware, 385 F.Supp. 937, 941 (D. Del. 1974). As this court said in Jackson v. University of Pgh., 405 F.Supp. 607, 617 (W.D. Pa. 1975):

> It cannot be said that the mere allegation of an agency relationship does, without more, constitute sufficient notice to comply with the statutory mandate of § 2000e-5(f)(1) except where there is a 'substantial, if not complete, identity of parties before the EEOC and the court.' (Cf. Chastang v. Flynn and Emerich Co., supra), or except where the EEOC actually had the opportunity to meet and attempt to conciliate with the party unnamed in the EEOC charge yet named as a

defendant in court. Hairston v. McLean Trucking Co., supra.

The facts do not reveal that either of these exceptions would apply to the instant case, and Murphy has not referred to any other authority to advance its arguments. The court will follow the majority view and reject the agency theory.

C.

Murphy's brief contends that as another exception to the general rule of 42 U.S.C. § 2000e-5(f)(1), the court has jurisdiction over the International as an indispensable or necessary party, under Rule 19 Fed.R.Civ.P. In support of this proposition, Murphy cites several cases which have not considered the failure to name a party before the EEOC as an absolute bar to the joinder of that party as necessary or indispensable to the Title VII action in federal court. Joinder of a local union, unnamed before the EEOC, was permitted pursuant to Rule 19 as a party needed for a just adjudication where the interpretation of a collective bargaining agreement was in issue. Reyes v. Missouri-Kansas-Texas R.R. Co., 53 F.R.D. 293, 297 (D. Kansas 1971), see also Kinnunen v. American Motors Corp., 56 F.R.D. 102 (E.D. Wisc. 1972); Held v. Missouri Pacific Railroad Co., 373 F.Supp. 996 (S.D. Texas 1974). Joinder of a union has been allowed in order to ensure that the rights of a discharged plaintiff's replacement were adequately represented. Bremer v. St. Louis Southwestern R.R. Co., 310 F.Supp. 1333, 1339-1340 (E.D. Mo. 1969). When an uncharged union may be generally regarded as "indispensable" under Rule 19 to a thorough and adequate implementation of relief compelled by the evidence, that party may be joined, even though the technical requirements of the Act may not have been fully met. See Macklin v. Spector Freight Systems, Inc., 156 U.S. App. D.C. 69, 478 F.2d 979, 993, n. 25 (1973) (dictum); United States v. Chesapeake and Ohio Ry. Co., 471 F.2d 582, 592-593 (4th Cir. 1972), *cert. denied sub nom*, Local 268, etc. v. United

States, 411 U.S. 939, 93 S.Ct. 1893, 36 L.Ed.2d 401 (1973).

Murphy also cites Evans v. Sheraton Park Hotel, 503 F.2d (D.C. Cir. 1974), in which case the plaintiff failed to name the international union before the EEOC. The district court joined the International as an indispensable party under Rule 19(a). The Court of Appeals affirmed.

The International distinguishes *Sheraton Park* from the case *sub judice*, arguing that the International was an indispensable party because the court required jurisdiction over it in order to enforce its decree providing for injunctive relief. In the instant case, no injunctive relief was required because the discriminatory portions of the agreements of 1965 and 1968 were eradicated in the 1971 contract. The International argues that unlike *Sheraton Park*, complete relief could be obtained by plaintiff in this case from Local 940 and Murphy. Therefore, the International is not a necessary party within the meaning of Rule 19(a).

However, the significance of *Sheraton Park* to this case is the fact that the decision is based on the proposition that a court may join necessary parties under Rule 19 despite the failure to name the parties before the EEOC. The court noted that this determination is founded upon the premise that procedures before the EEOC should not serve as a "stumbling block to the accomplishment of (Title VII's) statutory objectives." 503 F.2d at 183.

In the case *sub judice*, the court need not decide whether the International is an indispensable or necessary party under Rule 19, Fed.R.Civ.P. This case differs from *Sheraton Park* because it concerns the claims for contribution filed by one defendant against other defendants. The court is not adjudicating the merits of the claims of plaintiffs against the defendants.

Murphy's brief also relies on the case of Torockio v. Chamberlain Mfg. Co., 51 F.R.D. 517 (W.D. Pa. 1970) in opposing the International's jurisdictional argument. The factual alignment of the parties in *Torockio* parallels the case *sub judice*.

In *Torockio,* plaintiff, alleging sex discrimination, charged her employer and her local union before the EEOC and named them as defendants in her complaint. Because the international union was also a signatory to the labor contract, which was an important facet of plaintiff's case, the employer moved to join the international under Rule 19 or in the alternative under Rule 14 as a third-party defendant. The international, through the local union, objected to the joinder on the basis that the court lacked subject matter jurisdiction over it since it was not named before the EEOC. After noting the general rule, District Judge Weis (now Circuit Judge) observed that the defendant employer, not the plaintiff, was seeking to join an additional party and that the defendant was not given and, of course, could not be given the right to join parties before the EEOC. Judge Weis analyzed the issue as

> . . . Whether the Civil Rights Act by implication deprives the defendants of their very valuable rights under the Federal Rules of Civil Procedure to have a resolution of all facets of the dispute in one proceeding—the 'just, speedy, and inexpensive determination of every action' as Rule 1 phrases it.
>
> 51 F.R.D. at 519.

After noting that no case was precisely on point, the court in Torockio concluded:

> . . . there is no conflict between the jurisdictional requirements of the Act requiring the plaintiff to name all potential defendants as respondents in the administrative proceedings and the Rules of Civil Procedure which allow the defendants to bring appropriate parties into the case once suit has been filed in the district court.
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> • • •
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> It seems clear that the Chamberlain Company (the employer) has set out a claim for contribution which would entitle it to join the international as a third party defendant under Rule 14. The court, however, recognizes the limitations which a joinder under that theory may entail and chose instead to order the addition of

> the international as a defendant in accordance with Rule 21.[8]
>
> 51 F.R.D. at 519. (Cite omitted)

The reasoning behind the *Torockio* decision is precisely applicable to the instant case. Unlike *Torockio,* plaintiff named as defendants Murphy, Local 940, the International, and Local 249, even though the latter two unions were not named before the EEOC.[9] Therefore, Murphy simply asserted its claims for contribution against the unions in cross-claims and did not need to utilize Rule 14's third party provisions. It is apparent that under the authority of *Torockio,* if plaintiffs had not named the unions as defendants, Murphy could have asserted its claims against them under Rule 14, Fed.R.Civ.P. Of course, the case *sub judice* has progressed to a point where subsequent to the settlement, Murphy's remedies against the unions are in the form of claims for contribution. In the sense that Murphy like Chamberlain in *Torockio* is a defendant employer, both of them similarly lack the ability to name parties as respondents before the EEOC. To adopt the International's argument would interpret the administrative procedures of the Civil Rights Act to be in conflict with the Federal Rules of Civil Procedure. *Torockio* has concluded that such a conflict does not exist. This is the only reasonable conclusion. The fact that the International may not have been named before the EEOC does not preclude this court from exercising subject matter jurisdiction over it where its joinder could be accomplished through Rule 14 if it had not been named as a defendant and, more importantly, where its presence is essential to the disposition of the remaining issue in this lawsuit—Murphy's right of contribution from the International. The equitable prin-

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[8] Rule 21, Fed.R.Civ.P.

[9] Local 249 has not directly challenged the court's subject matter jurisdiction over it; however, the reasoning the court utilizes to reject the International's argument is equally applicable to the position of Local 249.

ciples embodied in Title VII and the mandate of the Federal Rules of Civil Procedure that all facets of a dispute should be resolved in a "just, speedy and inexpensive" manner require rejection of the International's contention. The court has subject matter jurisdiction over the International and Local 249.

III

The employees of Murphy's McKeesport, Pennsylvania, warehouse were initially organized by the AFL-CIO in April 1956 (Murphy Ex. 4). Subsequently, on April 18, 1956, Ernest Burberg, an International Representative, filed a petition with the NLRB for certification of "Retail, Wholesale and Department Store Union, AFL-CIO" as the unit's collective bargaining representative. On September 6, 1956, an election was held, and on September 14, 1956, a Certification of Representatives" was issued by the NLRB in which the "Retail, Wholesale and Department Store Union, AFL-CIO" was certified as collective bargaining representative of the unit. (Murphy Ex. 5)

The first collective bargaining agreement between Murphy and "Retail, Wholesale and Department Store Union, Local 940 affiliated with the AFL-CIO" was entered into on December 7, 1956, and by its terms continued in effect until January 2, 1960. This document was signed by Burberg, as "International Representative," and by various Local 940 members and E. G. Procious, Murphy's Director of Public-Employee Relations. (Murphy Ex. 6) On or about January 20, 1957, an application was filed by Local 940 with the Retail, Wholesale and Department Store Union for a local union charter. (International Ex. G)

The second collective bargaining agreement between the parties (Murphy Ex. 7), effective from January 22, 1960 to January 2, 1965, was also signed by Burberg and various union members. Both of these contracts contained separate seniority lists for males and females and disparate wage scales providing males with a higher wage rate than fe-

males. The 1965 and 1968 collective bargaining agreements (Murphy Exs. 8 & 9, International Exs. C & D) between Murphy and Local 940 contained provisions which discriminated against female employees at Murphy's McKeesport warehouse in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, *et seq.*, and the Equal Pay Act, 29 U.S.C. § 216(b) in that they:

(1) contained separate male and female seniority lists. (Tr. 19, 93)

(2) prohibited transfers from either seniority list to the other. (Tr. 93)

(3) maintained separate male job classifications (Nos. 1-8), and female job classifications (Nos. 21-23, 31, 35, 41). (Tr. 18-19)

(4) prohibited transfers between male and female job classifications. (Tr. 19)

(5) provided higher pay rates for the male job classifications than for female job classifications although the jobs required similar or equal work (Murphy Ex. 8 & 9). (Tr. 18-20, 74-75, 78, 91, 140, 146-9)

As with the 1956 and 1960 agreements, Procious, Burberg, as the International's representative, and various member-officers of Local 940 were signatories of the 1965 and 1968 contracts.

IV

Murphy advances five theories to support its position that the International is liable along with Murphy for the sexually discriminatory employment provisions contained in the 1965 and 1968 collective bargaining agreements: the International is liable (a) as a party to the 1965 and 1968 collective bargaining agreements; (b) as a union which failed to take reasonable steps to assure compliance with Title VII of the Civil Rights Act of 1964; (c) as the exclusive certified collective bargaining agent of the employees in the warehouse; (d) as the principal of Local 940; and (e) as a union which failed to fairly represent its members.

A.

Whether the International is a party to the 1965 and 1968 contracts depends upon the conduct and activity of Ernest Burberg, who, as the International's representative, counseled and advised Local 940 on virtually every significant union function.

During the time in controversy, Burberg was the sole representative for the International in Western Pennsylvania. He was first employed by the International in 1942 (Tr. 170) and was continuously employed by the International through 1971. Burberg was not a member of Local 940 and was not paid by Local 940. His salary was paid by the International. Burberg had a Pittsburgh office and a secretary. Local 940's office, located in McKeesport, had no clerical assistance. (Tr. 238) Burberg utilized his secretary to assist and accommodate Local 940 wherever necessary and specifically in two ways: (1) whenever an employee's grievance reached the fourth step level,[10] the grievance was typed by Burberg's office and a copy of it was mailed to the company (Tr. 185-5, 189); and (2) in preparation for the 1965 and 1968 contract negotiations, Local 940's proposals for negotiation [11] were typed by his office, signed

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[10] Local 940 had a four-step grievance procedure. The first three involved conciliatory discussions between the union representatives and lower level management personnel. Prior to the commencement of the fourth-step level, the grievance was given to Burberg, who had it typed and mailed to Mr. Procious. Burberg then would arrange a convenient time for the fourth-step grievance conference. (Tr. 40, 184-5).

[11] Robert Backstrom, president of Local 940 during 1965 and 1968 contract negotiations, described the procedure used by the Local in formulating its contract proposals: a planning committee, composed of any interested union member, presented their ideas on the contract demands to the negotiating committee, which was composed of the union's officers and approximately four elected union members. This committee in turn reviewed the proposals and submitted their appropriate demands to the company during negotia-

by Burberg, and presented to the company. (Tr. 240) Burberg was present at every important Local 940 activity. He attended the Local's monthly membership meetings (Tr. 204-5), and met regularly with union officials to discuss union matters (Tr. 76, 205, 241, 266). He also telephoned Local 940's president with advice on union business twice weekly (Tr. 205, 266). He counseled the union on the propriety and legality of its position at all the fourth-step grievance meetings (Tr. 23-25, 267), attended all the 1965 and 1968 negotiating sessions (except one where he arrived late) (Tr. 76, 95, 124, and 204), and signed, as the International's representative, each of the four collective bargaining agreements (1956 [Ex. 6], 1960 [Ex. 7], 1965 [Ex. 8], 1968 [Ex. 9]). Burberg may be appropriately characterized as the most experienced person on the union's side of the 1965 and 1968 negotiating table (Tr. 203). It may also be concluded that because Local 940 did not have an attorney who participated in the 1965 and 1968 negotiations, the union turned to Burberg for counseling on the legality of the negotiations (Tr. 206, 268). The attorney counseling Murphy at the contract negotiations occasionally met privately with Burberg to discuss union matters (Tr. 206). And during the negotiations, union officials would privately consult Burberg for his opinion on the various aspects of the negotiations (Tr. 268), and Burberg's opinion generally was adopted by the union [12] at the negotiation table.

Murphy argues finally that Burberg signed the 1965 and 1968 collective bargaining agreements. The International argues that it was not a party to nor was bound by the

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tions. (Tr. 239-40). As noted, Burberg would advise and counsel the committee on the legality of their negotiations.

[12] On cross-examination, Backstrom testified that he could not recall if Burberg's opinion as to the negotiation proposals was adopted by the union as its position. (Tr. 269). However, Murphy's counsel impeached the witness by showing that in an earlier deposition Backstrom had confirmed that the union adopted Burberg's opinion.

contracts in question because Burberg had no authority to place his signature on the contracts on behalf of the International, since the instructions and provisions of the International's constitution (Article VIII, Section 10 of International Exs. E, F, and K) prohibited such action without appropriate authorization. Murphy argues that even if Burberg did not have explicit authority to bind the International, he had the apparent authority to do so. The International, in its brief, does not confront Murphy's apparent authority argument directly. It argues that Burberg's signature on the contracts as the International's representative is irrelevant since the preamble and termination clauses in the 1965 and 1968 labor contracts set forth the names of the parties to the contracts as Murphy and Local 940, and because the International is not named therein, it is not a party to the contracts.

In determining whether Burberg had the apparent authority to bind the International to the 1965 and 1968 contracts, the court must look to the law of the forum state—Pennsylvania.[13] In Revere Press, Inc. v. Blumberg, 431 Pa. 370, 246 A.2d 407, 410 (1968), the Pennsylvania Supreme Court stated:

> Apparent authority is power to bind a principal which the principal has not actually granted but which he leads persons with whom his agent deals to believe that he has granted. Persons with whom the agent

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[13] There is no federal statute that covers the question of apparent authority in a Title VII lawsuit; the analagous state law on this point may be utilized to enforce the court's equitable powers. A state's agency law has been applied in the prosecution for forging and uttering U.S. Treasury checks under 18 U.S.C. §§ 495, 1702, Ross v. United States, 374 F.2d 97 (8th Cir.), *cert denied*, 389 U.S. 882, 88 S.Ct. 130, 19 L.Ed.2d 177 (1967). Appropriate state statutes of limitations have been applied in civil rights cases under 42 U.S.C. §§ 1981, 1983, Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974) (en banc); Ammlung v. City of Chester, 494 F.2d 811 (3d Cir. 1974); Johnson v. REA Express, Inc., — U.S. —, — S.Ct. —, 44 L.Ed.2d 295 (1975).

> deals can reasonably believe that the agent has power to bind his principal if, for instance, the principal knowingly permits the agent to exercise such power or if the principal holds the agent out as possessing such power. Jennings v. Pittsburgh Mercantile Co., 414 Pa. 641, 202 A.2d 51 (1964); Restatement (Second), Agency §§ 8, 27 (1958).

Under Pennsylvania law, apparent authority flows from the conduct of the principal and not that of the agent. William B. Tanner Co., Inc. v. WIOO, Inc., 528 F.2d 262 (3d Cir. 1975). In this regard, the words of Judge Luongo are illuminating:

> It is sufficient to create apparent authority if the principal should realize that his conduct is likely to create a belief that the agent is authorized to act for him. Restatement of Agency, 2d, § 27, Comment a, p. 104. See Revere Press, Inc. v. Blumberg, et al., 431 Pa. 370, 246 A.2d 407 (1968). Once apparent authority has been created, it does not terminate until the third person has reason to know that the principal has revoked the authority, or that the agent has renounced it, or that such time has elapsed or such events have happened after the authorization as to require the reasonable inference that the agent's authority has terminated. Restatement of Agency, 2d, § 125, Comment b.

Reading Co. v. Dredge Delaware Valley, 468 F.2d 1161, 1163 (3d Cir. 1972) (footnote omitted).

There is no dispute that Burberg was the International's sole representative and agent. Nor can it be disputed that an officer of the International acquiesced while Burberg signed the 1965 and 1968 labor contracts as the International's representative. Gerald Hughes, vice-president and area regional director of the International, testified that he attended and participated in the 1964 negotiation leading to the 1965 contract (Tr. 228), that he knew from his examination of the 1965 and 1968 contracts that Burberg had signed them as "International Representative" (Tr. 229), and that he never disciplined Burberg for holding himself out to the company and public in this fashion (Tr. 229). As a result of the February, 1969 wildcat strike by

Local 940, Hughes came to McKeesport to negotiate with the local union and to recommend a settlement of this unauthorized strike (Tr. 221-22). Hughes identified the agreement (International Ex. Q) which ultimately settled the strike, and said he knew that Burberg had signed the document as International Representative (Tr. 227), and again permitted Burberg to use that title in signing the agreement. Based on these facts, it is reasonable to conclude that the International through Hughes knowingly permitted Burberg to hold himself out to the company and to the public as a duly authorized agent of the International, thereby creating in Burberg apparent authority. Cf. William B. Tanner Co., Inc. v. WIOO, Inc., *supra*.

It is unrealistic to conclude, as the International would have the court do, that Burberg signed all the labor contracts from 1956 through 1971, and the strike settlement agreement of 1969 merely to indicate that he "was present at the time of the negotiations" (Tr. 191, 230). The court has concluded that the International by its acquiescence and permission created in Burberg apparent authority. The court further concludes that the scope of authority of an agent or representative under these circumstances normally would include the power to enter into contracts and to bind the principal by his signature. Cf. East Girard Savings & Loan Ass'n. v. Houlihan, 373 Pa. 578, 97 A.2d 23 (S.Ct. Pa. 1953). In light of the facts of record, there appears to have been no reason for Murphy to have concluded that Burberg's signature on the 1965 and 1968 contracts was not the equivalent of the International's signature and approval of the agreements. It was reasonable for Murphy to conclude that Burberg's signature bound the International to the contracts.

Murphy contends that the International, as a party to the 1965 and 1968 collective agreements, is liable under 42 U.S.C. § 2000e-2(c),[14] for the discriminatory employment

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[14] 42 U.S.C. § 2000e-2(c) states:

(c) It shall be an unlawful employment practice for a labor

provisions contained therein. These cases are cited by Murphy in support of its proposition: Johnson v. Goodyear Tire & Rubber Co.,[15] 491 F.2d 1364 (5th Cir. 1974); Guerra v. Manchester Terminal Corp.,[16] 498 F.2d 641 (5th Cir.

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organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

[15] In *Johnson*, the court concluded that a union, as a party to a collective bargaining which violates Title VII, was liable for a portion of the back pay award. The court stated:

> The union contends that the employer was the real instigator of the discriminatory evils established here and that it was merely a passive observer. Despite the union's attempt to present itself in the posture of the helpless negotiator, we think the union deserves more credit for the misdeeds established by Johnson. Several labor department employees testified about their futile attempts to obtain vigorous representation by the union. The union must have known precisely what effect the incorporation of the department seniority provisions in the collective bargaining agreement would have on labor department employees. Common sense demands that a union be held to the natural consequences of its labor in negotiating a collective bargaining agreement. 491 F.2d at 1381 (footnote omitted).

[16] In *Guerra*, the court found that Title VII was inapplicable. This language cited in Murphy's brief is actually a reference to Johnson v. Goodyear Tire & Rubber Co., *supra*. The court quoted *Johnson* to support its conclusion that a union, as a signatory to a racially discriminatory collective bargaining agreement, could

1974); and Macklin v. Spector Freight System, Inc.,[17] 478 F.2d 979 (D.C. Cir. 1973). A union, as a party to a collective bargaining agreement which contains provisions violating Title VII is liable along with the employer for the discrimination. Accord, Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372, 1379 (5th Cir. 1974). As noted in Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), *cert. dismissed*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971):

> The rights assured by Title VII are not rights which can be bargained away—either by a union, by an employer, or by both acting in concert. Title VII requires that both union and employer represent and protect the best interests of minority employees. Despite the fact that a strike over a contract provision may impose economic costs, if a discriminatory contract provision is acceded to the bargainee as well as the bargainor will be held liable. (Footnote omitted)

The object of the Civil Rights Act is to provide remedial and equitable relief from discriminatory employment practices. It is consistent with these purposes to impose liability on all parties to a discriminatory collective bargaining agreement.

The International advances two reasons in opposition. First, it contends that the record establishes that the negotiating committee, which was composed only of Local 940 members, had the exclusive power to negotiate the terms and conditions of the 1965 and 1968 labor contracts. Secondly, it contends that the unions did not know and were not informed that the warehouse's 25-pound weight-lifting restriction for females was probably a violation of EEOC

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be liable under 42 U.S.C. § 1981. From the stipulated facts, the unions, not the employer, were held to be ultimately responsible for the discrimination and the payment of the back pay award.

[17] In Macklin, *supra*, the court reversed the district court and found that Title VII imposes the obligation that a union in negotiating as well as administering a contract may not consent to provisions or take positions that are discriminatory.

regulations until the 1969 decision in Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir.).

The first argument is rebutted by the record, which proves that Ernest Burberg, the International's representative, significantly participated in proposing and in negotiating the sexually discriminatory contract provisions. In his direct testimony, Burberg acknowledged that certain job classifications were included in the 1965 contracts which were not contained in the 1956 and 1960 labor contracts. Burberg, however, stated that he had no recollection of what the classifications were. In preparation for the 1965 contract negotiations, a memorandum (International Ex. N) was sent from Burberg to Procious dated August 28, 1964, which contained a general outline of the union's articles for negotiation. Local 940's president, Robert Backstrom, stated that Burberg typed these proposals (Tr. 238). A letter from a member of Local 940's negotiating committee to Procious (International Ex. O) specifies the proposed points of the 1965 contract that were to be discussed on September 23, 1964. Included within these points were references to the female job classifications (Section 2(A)) and the explanation that men would not perform female work and vice versa (Section 5). Procious, who headed Murphy's team in the 1965 contract negotiations, explained that the male and female job classifications of the 1965 (and 1968) labor contracts were initially one of the company's demands and then the same male/female job classifications and separate seniority lists were proposed by the union (Tr. 92-93).

Burberg, in addition to not recalling the nature of the 1965 job classifications, also could not recall whether the union or the company first proposed these classifications. (Tr. 196). As previously noted, on the union's side of the negotiating table, the members looked to Burberg [18] for the ultimate approval, advice, or suggestion as to the legality

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[18] And, of course, Burberg himself thought that he was the most experienced union negotiator. (Tr. 203).

of the various proposals and the appropriate union position. (Tr. 76, 95, 175, 241, 267-68). Based on this evidence, Murphy and Local 940, upon the advice and guidance given by Burberg, mutually agreed to the sexually discriminatory contract provisions. Through Burberg, the International negotiated for the discriminatory contract provisions and approved them by Burberg's signing of the contract. It does not square with the reality of the 1965 and 1968 negotiating sessions to argue that Burberg did not actively participate in the negotiations or to suggest that the company pressured the union into accepting the unlawful provisions. The discriminatory provisions of the contract were as much a product of the unions' (Local 940 and the International) conduct as of Murphy's. The discrimination resulted from the concerted efforts of both the unions and the company.

The International's second defense generally advances a good-faith argument against holding it responsible for the discriminatory contract provisions. It is asserted that the 25-pound weight restriction utilized in the warehouse generally to distinguish between male and female work was relied on in good faith by the unions until 1969 when the EEOC regulations prohibiting such restrictions were made public in Bowe v. Colgate-Palmolive Co., *supra*.[19] This argument is also not persuasive for two reasons. Good-faith defenses have been generally rejected where raised in Title VII cases. Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). See also Johnson v. Goodyear Tire and Rubber Co., *supra*, 491 F.2d at 1377, 1382; Robinson v. Lorillard Corp., *supra*, 444 F.2d at 804. The effective date of Title VII is July 2, 1965, and from that date onward, employers as well as unions have been on notice that discrimination based upon race, sex, etc., whether covert or overt is illegal. To adopt the union's

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[19] EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a)(1)(ii): "The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."

good-faith defense would be to push back the effective date until 1969. This would be inimical to the strong remedial nature of Title VII.[20]

While sex as a bona fide occupational qualification may be lawfully justified in terms of the requirements of certain jobs demanding extreme physical capabilities, Cf. Taylor v. Goodyear Tire & Rubber Co., 5 EPD § 8545 (N.D. Ala. 972); 29 C.F.R. § 1604.8, and even assuming arguendo that the particular weight restriction herein falls within such a class of jobs, the International's good-faith argument still must be rejected. The sexual discrimination perpetrated through the 1965 and 1968 contracts had various forms which were specifically detailed therein: (1) separate male/female seniority lists; (2) male/female job classifications; and (3) higher wage rates to the male classifications. The weight restriction was simply one manner in which the separate male and female job classifications were perpetuated. No good-faith defense has been advanced by the International to defend a contract containing separate seniority lists or providing higher pay to the male classifications for work substantially similar to that performed by women in lower paying female job classifications. Title VII is a heavily weighted remedial tool designed to provide back pay for the financial loss suffered as a result of discrimination, whether the result of good-faith or bad-faith employment practices.

Murphy's second theory in support of its position that the International is equally liable along with the company is that the International failed to take affirmative steps to assure compliance with the spirit of Title VII. Murphy cites Myers v. Gilman Paper Corp., 392 F.Supp. 413 (S.D.

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[20] The Supreme Court in *Albemarle Paper* stated with reference to an employer's good-faith defense: "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.'" (Emphasis in original) 422 U.S. at 422.

Ga. 1975);[21] Cooper v. Philip Morris, Inc., 9 EPD ¶9929 (W.D. Ky. 1975);[22] Taylor v. Goodyear Tire and Rubber Co., 5 EPD ¶8545 (N.D. Ala. 1972);[23] and Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974).[24] While all four of these cases support the proposition that a party to a discriminatory collective bargaining agreement is liable under the Act, only *Gilman* and *Cooper* specifically advance Murphy's second theory. In *Gilman*, in response to the International's argument that it could not possibly police the activities of its thousands of locals, the court stated:

> [Title VII] places an affirmative duty on unions to eradicate present discrimination and the effect of past discrimination. (Citations omitted).
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[21] In the *Gilman Paper* case, various international and local unions, as parties to a collective bargaining agreement which carried forward the employer's prior discrimination, were found liable under Title VII. The court also concluded that the unions' failure to renegotiate the discriminatory provisions of the contract also was sufficient to impose liability under Title VII, and that the international unions had a duty "to take reasonable affirmative steps to assure compliance with Title VII." 392 F.Supp. at 423. As to the allocation of damages, the court held the unions liable for 50% of plaintiff's economic loss, and back pay liability was assessed one-third against the company, one-third against the local unions, and one-third against the international unions.

[22] The *Cooper* case supports the proposition that a union, despite the absence of protests from the affected members, has the duty not to negotiate or to renegotiate a collective bargaining agreement which discriminates or which has the effect of continuing the consequences of past discrimination.

[23] In Taylor, *supra*, the employer and the local union entered into an agreement which provided higher sickness and accident benefits for male employees than female employees. The court concluded that because the union was an equal partner in negotiating the discriminatory agreement, it should equally share responsibility for damages resulting therefrom.

[24] In Waters, *supra*, the court found the union liable as a party to an agreement which contained a discriminatory provision.

> In answer to [the International's] argument that it cannot possibly police the effect of its 1,675 locals' collective bargaining agreement, the court finds that [the International] has International Representatives who are knowledgeable in the activities of its locals and through whom the IBEW could take reasonable steps to assure compliance with the mandates of Title VII. 392 F.Supp. at 421, 422.

In the case *sub judice*, there is no evidence that the International representative, Burberg, took any steps to eradicate the effect of the discriminatory provisions of the 1965 and 1968 contracts. To the contrary, the testimony of plaintiffs Glus and Adamcik shows that the International, through Burberg, and the local at least failed to support their attempts to enter higher paying, male job classifications.

Glus wanted a Group 3 male job because the man occupying that job had less seniority. (Tr. 42). A Local 940 officer refused to support Glus for the job. She therefore decided to file a grievance. Glus frequently discussed her grievance with Local 940 officers and with Burberg. (Tr. 23). After the fourth-step grievance conference at a McKeesport hotel, she stated that Burberg instructed her to drop her charge and forget the entire matter. (Tr. 25). Burberg said he attended the grievance meeting but that he did not remember much about it. He denied telling Glus to drop her grievance, contending instead that he told her to hold her charge until after the 1968 contract was signed. (Tr. 185-186).

Plaintiff Adamcik in 1968 made a proposal to the president of Local 940, Robert Backstrom, that women in the warehouse who were doing work equal to that performed by men should receive equal pay. Backstrom told her to drop the complaint until after the 1968 contract was signed. (Tr. 74). Adamcik said she raised the question of having one seniority list at a union membership meeting and that she was laughed at by the union officers, Burberg[25] and

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[25] Adamcik testified that she believed that Burberg attended the meeting. Burberg, himself, said he attended all union membership meetings.

the union members in attendance. (Tr. 76, 204-05).

C.

Murphy argues that the International is the exclusive certified bargaining agent for the warehouse employees, and as such is the only party who could bind these employees to a labor agreement and is therefore liable for any discriminatory provisions contained in the collective bargaining agreements of 1965 and 1968. The record does show that the "Retail, Wholesale and Department Store Union, AFL-CIO" was certified on September 14, 1956 by the NLRB as the collective bargaining representative for Murphy's warehouse production employees. (Murphy Ex. 5). However, prior thereto, the 1956 labor contract listed the "Retail, Wholesale and Department Store Union, Local 940, affiliated with AFL-CIO," as the other party to that contract. The fact that Local 940 may never have been certified by the NLRB did not prevent it from acting as the collective bargaining representative for the warehouse unit. The record shows that Local 940 in every practical sense acted as the representative for the unit from 1956 through January 1971. The International, of course, initially organized the warehouse employees in 1956 and subsequently issued a charter to Local 940 in 1957. The International's interests in Local 940 were attended to by its representative, Burberg. In fact, at that time both the International and Local 940 jointly represented the warehouse employees.

Murphy's theory is that the International is liable for the discrimination solely by virtue of its certification as the unit's collective bargaining representative. Murphy cites no authority for this theory. The NLRB's certification of the International advances Murphy's theory that the International is liable for failing to take affirmative steps to eradicate the discrimination. Therefore, this argument is more accurately described as a factual matter that supports Murphy's other theory of liability. The International's certification as the collective bargaining representative for the warehouse unit does not in and of itself establish its liabil-

ity for the discriminatory employment practices contained in the 1965 and 1968 contracts.

D.

Murphy argues that the International is liable as the principal of Local 940. It is, of course, true that the broader and more plenary control that the International has over local unions, the more likely it is that an agency relationship will be found to exist and that the activities of the local may be imputed to the International. International Bro. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. United States, 275 F.2d 610 (4th Cir. 1960);[26] Great Coastal Express, Inc. v. International Brotherhood of Teamsters, 350 F.Supp. 1377 (E.D. Va. 1972).[27] The applicable provisions of the International's constitutions (Exs. E and F) provide the International with broad control over its local unions. For example, the International had the power to discipline locals by revoking their charters (Article XIV, Section 3), it would prescribe rules and procedural requirements for locals' monthly meetings (Article XIII, Section 8), its rules were supreme to any conflicting local union rules (Article II, Section 2), and it had membership provisions similar to those of its locals, including joint membership in the local and in

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[26] In *Teamsters Union v. United States*, the local union was in trusteeship and therefore under the direct control of the International union. The court, after a thorough examination of the provisions of the International's constitution, concluded that the far-reaching control of these provisions created a relationship of principal and agent between the International and the local, and that the local was not an autonomous body but a subdivision of the International subject to the International's control. 275 F.2d at 614.

[27] In *Great Coastal Express*, the court again examined a modified but essentially similarly worded International Teamster constitution, and concluded that the rationale of International Teamsters v. United States, *supra*, applied and that an agency relationship existed so as to justify imputing the actions of the various Teamsters' local unions to the International union.

the International (Article VII, Section 9). The provisions of the International's constitution itself do not establish as a matter of law that an agency relationship exists between the International and Local 940 which would establish the International's liability for the discriminatory provisions in the contracts. The International's liability depends upon what it did through its representatives to propose, implement, or acquiesce in the discriminatory contract provisions. In other words, the culpability of the International for the sex discrimination must focus on the actual influence of its representative, Burberg, during the contract negotiations and not on the definition of the International's function as set out in its constitution.

The record does not support the conclusion that Local 940 was the agent of the International.

E.

Whether the International breached the duty of fair representation owed to its members, Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), has no bearing upon the question of the International's liability together with Murphy for the violations of Title VII contained in the contract. Contribution presupposes a common liability shared by two or more actors on a pro rata basis. As an employer, Murphy is, of course, not the representative of its employees and therefore does not owe them the duty of fair representation. Any breach of the duty of fair representation owed by the International to its members thus is irrelevant to Murphy's claims for contribution.

V

Murphy filed a motion for contribution on October 27, 1972 against Teamsters Local 249, seeking one-half the amount of the award to its female warehouse employees relating to the period February 1 to June 30, 1971. Murphy first contends that Local 249 concurred in or failed to correct the effect of the discriminatory practices under the 1965 and 1968 contracts between the time it was certified

as the unit's representative (February 1, 1971) and the effective date of the 1971 collective bargaining agreement (June 22, 1971). In support of this theory of liability, Murphy cites the cases it cited to support its theory that the International was liable for the discrimination because it failed to take affirmative action to assure compliance with Title VII.

Secondly, and more specifically, Murphy contends that Local 249 is liable for this portion of the award because the Local at the last negotiating session (June 3, 1971), rejected Murphy's retroactivity proposal, which would have eliminated the wage differential paid to females during the period in question. Local 249 denies that any such retroactivity proposal was ever made by Murphy and that discrimination occurred between February 1 and June 30, 1971. It argues in response to Murphy's contentions that it was not guilty of any "ineffectual passivism" in negotiating and executing the 1971 collective bargaining agreement with Murphy, and that all discriminatory practices were eliminated as of January 31, 1971. Furthermore, it asserts that it took all reasonable affirmative steps to assure compliance with Title VII of the Act.

The court notes that the following background and introductory facts are largely undisputed: as a result of the consent election held in the fall of 1970, the General Teamsters, Chauffeurs and Helpers, Local No. 249, became the collective bargaining agent for Murphy's warehouse employees on January 19, 1971 and continued in that capacity through June 1971 (Tr. 28, 265). The 1968 collective bargaining agreement, which contained the sexually discriminatory provisions, expired by its own terms on January 31, 1971 (Exs. 9, C). Between February 1 and June 3, 1971, Murphy and Local 249 engaged in contract negotiations which ultimately resulted in the execution of a collective bargaining agreement dated June 11 and effective June 22, 1971 (Tr. 84, 98). During the contract negotiations, the question arose as to the hourly rate to be paid to employees while the negotiations continued. On March 8, 1971, Murphy

and Local 249 agreed that any increase in the hourly rates of pay, as finally negotiated between the parties, would be retroactive to February 1, 1971 (Murphy Ex. 11, Tr. 95-98). This agreement was communicated to the union members (G. C. Murphy Ex. 3).

Throughout the negotiations, the parties were concerned about eliminating the sex discrimination caused by certain provisions of the 1965 and 1968 contracts. Although the 1971 contract (Local 249 Ex. 11) prospectively eliminated all prior sex discrimination, and although the contract gave all employees a 45 cent increase in the hourly pay rate retroactive to February 1, 1971, the female jobs were still classified under the terms of the 1968 contract during this period and females thus were paid less than male employees who performed substantially similar jobs. Although the hourly wage increase was retroactive to February 1, the wage differential between the male and female job classifications was not eliminated until after the contract became effective on June 22, 1971. It was only after the contract was signed that the male and female seniority lists were merged, and, on the basis of the unified seniority list, could the females bid on jobs classified in a non-discriminatory manner. Not until the slotting-in and the job-bidding took place was the females' permanent rate determined.

By letter dated June 18, 1971, plaintiff's counsel complained to Leo Heckman, business agent of Local 249, that the union's failure to rectify the discriminatory wage differential from February 1 to June 1971 would result in plaintiff Glus filing a complaint with the EEOC (Murphy Ex. 2). The differential was not retroactively corrected, and on June 28, 1971, plaintiff Glus filed a charge with the EEOC naming Murphy and Local 249 as respondents (Murphy Ex. 3).

The controverted issues of fact involve the negotiating session between Murphy and Local 249 on June 3, 1971. This negotiating meeting was held in the library of Mur-

phy's counsel. Among the persons present on behalf of Murphy were E. Procious, senior vice-president; D. Fawcett, counsel for the company; E. McGinley, manager of labor relations; and A. Hornbake, manager of warehouse operations. Leo Heckman, business agent for Local 249; L. Donnelly, a union steward; Hoffman; and Martinelli were among those representing the union. J. Biondi, a federal mediator, was also present (Tr. 118, 165). Procious and McGinley testified that at the meeting, Fawcett, on behalf of Murphy, made an oral proposal to retroactively eliminate the wage differential as of February 1, 1971 by the following formula: (a) the females would be first slotted in to the male seniority list; (b) on the basis of this merged seniority system, each female would be placed in an appropriate job under the revised non-discriminatory job classifications; and (c) the amount which the females had actually received during the period from February 1 to June 30 would be subtracted from the amount which they would have received under the merged seniority list, and the females would be paid the difference. (Tr. 99-100, 134-163). According to this plan, of course, each female would not receive a uniform rate; but rather, each would be compensated differently depending upon each female's warehouse seniority. Procious stated that Heckman and Biondi rejected the proposal as being too complicated. (Tr. 99-100). McGinley corroborated this by testifying that the retroactivity proposal was rejected by Heckman and Biondi as being confusing, and that Heckman demanded that a lump sum be paid to all the members of the bargaining unit. (Tr. 135). Hornbake stated that although he was not present for the entire meeting, he was present when the company made a proposal concerning retroactivity and that the procedures to be utilized in the slotting were discussed. (Tr. 128). However, Hornbake did not know the contents of the proposal, nor was he present when the union allegedly rejected the proposal. (Tr. 128-29). On the other hand, Donnelly, a union steward, stated he did not believe that the company had ever made such a proposal. (Tr. 295).

Whether the proposal was made by the company and rejected by the union is a very close issue of fact. All the witnesses who definitively testified about this matter were either aligned with the company (Procious and McGinley) or the union (Donnelly). Neither the party who actually made the alleged proposal (Fawcett) or the parties who allegedly rejected it (Heckman and Biondi) testified. The fact that the proposal was made orally and not evidenced by any writing also compounds the difficulty the court faces in deciding this factual issue.

We conclude that the proposal was made. Procious and McGinley both definitively stated what the proposal was, the circumstances under which it was made, and the reasons offered by the union representative and the federal mediator for rejecting it. Donnelly definitively stated that no written proposal was made; this, or course, is undisputed. Donnelly stated that he "did not believe" that an oral proposal was made.

The union points to the contract agreement of 1971 (Local No. 249 Ex. 11) and contends that because it does not include the retroactivity proposal, none was ever made. The probability is that the contract embodied only what was agreed to at the 1971 negotiations.

Even assuming that no retroactivity proposal was ever made by the company, the record supports the finding that Local 249 did not take positive, affirmative steps to assure compliance with Title VII during the contract negotiations. While it may be true that the 1971 contract contained no discriminatory provisions, it is beyond dispute that the 1971 contract, agreed to by Local 249 and Murphy, did not retroactively eliminate all prior discriminatory practices. The wage differential between the female/male job classifications was still in effect while the negotiations continued. By failing to eradicate this differential, Local 249 and Murphy permitted the effect of the prior discrimination to continue between February and the end of June 1971. As the court has noted, a union may be held liable for its

failure to take affirmative steps to assure compliance with the Civil Rights Act. *Myers* v. *Gilman Paper Corp., supra; Cooper* v. *Philip Morris, Inc., supra.*

Local 249 contends that no union member complained of the differential *before* the contract was signed on June 11, 1971. It is, of course, true that Local 249 was informed by letter dated June 18 (Murphy Ex. 2) about plaintiff Glus' complaint concerning the contract. Whether any member in fact complained of the differential during the negotiations is of no moment. As representative of the unit, Local 249 had an affirmative duty during the negotiations to eliminate all vestiges and effects of the prior discrimination. *Cooper* v. *Philip Morris, Inc., supra.* The fact that the June 1971 contract prospectively eliminated all sex discrimination is of no consolation to the females who, because of sex, were denied the wages that were due them during the period from February 1 through the end of June 1971. Good-faith bargaining by Local 249 is not a defense to its liability for failure to affirmatively enforce Title VII. Cf. *Albemarle Paper Co.* v. *Moody, supra.*

Local 249 argues in its brief that it is not the intent of Title VII to penalize a union for the sex discrimination which had existed for the prior six years. However, Local 249 is not being held liable for the prior discrimination; indeed, it was not a party to such discrimination. It is merely accountable along with Murphy for that portion of the prior discrimination that continued from the time it became the collective bargaining agent until the effective date of the new contract prospectively eliminating the wage differential paid to females. Title VII is a strong remedial tool, and the intent of the Act requires that those parties responsible for permitting prior sex discrimination to continue bear the consequences in the form of appropriate back pay awards.

The court concludes that the record and the applicable law support the conclusion that the International is jointly liable with Murphy under Title VII of the Act for the discriminatory employment practices existing in 1965 and

1968 collective bargaining agreements. With respect to Local 249, it is jointly liable with Murphy under Title VII for permitting the perpetration of the prior discrimination during the period from February 1, 1971 to June 30, 1971.

VI

Can an employer (Murphy), sued by employees for violating Section 6(d)(1) of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) [28] (and thus potentially subject to civil damages under 29 U.S.C. § 216(b) [29]), having paid the employees $100,000 as a settlement of their claim, seek contribution from the International and local unions alleged to have participated in the violation of the Equal Pay Act?

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[28] 1. Section 6(d) provides in relevant part:

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality or production; or (iv) a differential based on any other factor other than sex; *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. 29 U.S.C. § 206(d)(1)

[29] 29 U.S.C. § 216(b) in pertinent part provides:

(b) Any employer who violates the provisions of section 6 or section 7 of this act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any *employer* (including a public agency in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. (Emphasis added).

The unions contend that that under the language of the statute, only an employer, and not a labor union, is liable for back wages and civil damages. *Tuma* v. *American Can Co.*, 367 F.Supp. 1178 (D. N.J. 1973); *Cook* v. *Mountain States Telephone & Telegraph Co.*, 397 F.Supp. 1217 (D. Ariz. 1975); *Wirtz* v. *Hayes Industries, Inc.*, 58 CCH Lab. Cas., ¶ 32,085 at 43,556 (N.D. Ohio 1968).

The unions argue that since only Murphy, and not the International, is subject to liability for the Equal Pay Act violation, no common liability can be shown and therefore Murphy has no right to contribution from the International and Local 249 on the $100,000 settlement. Murphy, while conceding that the statute does not specifically provide for back pay awards and civil damages against unions, argues that where a federal statute provides a general right to sue for the invasion of federally protected rights, federal courts may use any available remedy to redress violations thereof. *Bell* v. *Hood*, 327 U.S. 778, 684, 66 S.Ct. 773, 90 L.Ed. 939 (1946). Accord, e.g., *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512 (E.D. Pa. 1946); *J. E. Case Co.* v. *Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed. 423 (1964); *Bivens* v. *Six Unknown Named Agents of Fed. Bur. of Narc.*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *Love* v. *Temple University*, 366 F.Supp. 835, 838 (E.D. Pa. 1973). Murphy also cites the case of *Hodgson* v. *Sagner, Inc.*, 326 F.Supp. 371 (D. Md. 1971), *aff'd sub nom, Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972) (per curiam),[30] to support its proposition that

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[30] In *Sagner*, the Secretary of Labor commenced an action pursuant to Section 17 of the Act, 29 U.S.C. § 217, seeking, initially, only injunctive relief against the union even though the union was jointly responsible with the employer (Sagner) for violations of the Act. At trial, the facts showed that the union attempted to secure "waivers" from the employees as to their entitlement to their legal rights and proper wages. The trial court granted the government's motion under Fed.R.Civ.P. 15 to amend its pleadings to conform to the evidence and thus made the union jointly liable for damages in addition to being subject to injunctive relief.

the unions are civilly liable for damages for a violation of 29 U.S.C. § 206(d)(1).

The majority view is that only employers are subject to civil liability in damages and back pay awards under § 216(b). *Tuma* v. *American Can Co., supra; Cook* v. *Mountain States Telephone & Telegraph Co., supra; Wirtz* v. *Hayes Industries, Inc., supra.* Section 216(b) by its terms refers only to an "employer." By comparison, § 216(a) refers to "any person." The Interpretive Bulletin of the Wage-Hour Administration, codified in 29 C.F.R. § 800, which is entitled to considerable weight in this court, *Roland Electric Co.* v. *Walling,* 326 U.S. 657, 66 S.Ct. 413, 90 L.Ed. 383 (1946), supports the majority view. The only other case [*Tuma* v. *Am. Can. Co., supra*] in this Circuit to consider and rule on the issue has followed the majority view. *Love* v. *Temple, supra,* cited by Murphy, does not support its proposition since that case did not rule on the issue; it merely discussed the matter. The *Sagner* case not only represents a minority viewpoint but is also distinguishable from the case *sub judice* since there the Secretary of Labor originated the action by requesting injunctive relief against the union under § 217.

Congress has specifically limited § 216(b) to employers, and all but one court which has ruled on the issue has followed that viewpoint.[31] This court considers the majority

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The trial court concluded that it was within its general equitable power to award damages against the union although the language of the civil liability statute was directed against employers only. No other case adopting this view has been cited by plaintiff.

[31] In Wirtz v. Hayes Industries, Inc., *supra,* where the court ruled that a federal court lacked the substantive power to grant monetary relief to an employer in its third-party complaint against the union, the court similarly reasoned:

> A reading of the statute [Section 6(d) of the Fair Labor Standards Act] and its legislative history does not disclose a purpose to make the union jointly liable in damages, but rather to give the Secretary of Labor power to enjoin violations of

view to be the more correct one. Congress gave the Secretary of Labor the ability to enforce the Equal Pay Act against unions by injunction under § 217 or by criminal prosecution for wilful violation under § 216(a); however, it specifically made only an "employer" (like Murphy) civilly liable for damages under § 216(b). Because the International and Local 249 are not liable for civil damages or back pay awards under § 216(b), Murphy has no right to contribution from the International or Local 249 for the $100,000 paid to plaintiffs in settlement of the Equal Pay Act claim.

VII

Both the International and Local 249 have attacked the basis of Murphy's claims for contribution. Prior to discussing the specific contentions raised by the unions on this point, it is appropriate that the court specify what Murphy is seeking through its claims. Until the time of the non-jury trial, it was unclear whether Murphy was seeking indemnity or contribution. Murphy's August 19, 1971 cross-claim against the International and Local 940 is a rambling, confusing pleading. The pleading appears to be in the nature of a cross-claim under Rule 13(g), Fed.R.Civ.P., against

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the Fair Labor Standards Act where a union is responsible, as well as power to enjoin employers from future violations and require payment for past ones. 29 U.S.C. § 215(a)(2) makes it unlawful for any person to violate any of the provisions of Section 206, and 29 U.S.C. § 217 gives the District Courts jurisdiction to restrain violations of section 215 (a)(2) where there has been a withholding of payments found by the court to be due to employees under the chapter. If the courts are given the express power to restrain the withholding of payments due employees by reason of past sex discrimination in violation of the Act it is impliedly only given that power against the employer, for the *union* would not be 'withholding . . . payment of minimum wages . . .'. Therefore, the only power given the District Courts against unions by this Act would be an injunction under section 217 to restrain the conduct prohibited in section 206(d)((2). *Id.* at 43, 557-43, 558.

the co-defendant unions seeking reimbursement for any liability Murphy might have to the plaintiffs. It is not a claim for contribution.

On October 27, 1972, subsequent to the entry and approval of the consent decree, Murphy filed a motion for contribution against Local 249. Although the motion is entitled one for contribution, the motion against Local 249 does not seek a pro rata sharing of Murphy's and Local 249's common liability.[32]

Similarly, the language of Murphy's motion for summary judgment[33] and/or contribution filed October 27, 1972 against the International and Local 940 is also unclear. Murphy, on the one hand, claims in its demand for judgment that it is seeking the total amount of the consent decree ($648,000) from the unions. In other parts of the motion, where it refers to joint liability among the company and the unions, Murphy appears to be describing a claim for contribution.

At trial and in its post-trial briefs, Murphy finally specified exactly what it seeks in its claiming contribution: it seeks from Local 249 approximately $18,000, which constitutes one-half of the total liability of Murphy and the Local to plaintiffs during the February 1-June 30 period; and it seeks $314,263.10 from the International minus approximately $4.000 paid by Local 940 to Murphy in a pretrial settlement.[34] Murphy contends that its claim is not

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[32] In this motion, Murphy is seeking $37,543.54 from Local 249. Prior to trial and in its post-trial briefs, Murphy now states that it is seeking over $18,000, which figure is roughly one-half the amount claimed in the motion. Apparently the amount claimed in the motion for contribution was the sum which Murphy determined to be the common liability of Murphy and Local 249 during the period February 1 to June 30, 1971.

[33] As noted, the motion for summary judgment was denied by the court.

[34] Murphy's claims for contribution against the two unions include Murphy's mistaken assertion that the unions are also com-

limited to its motions for contribution or its cross-claim on the ground that the court could order the unions to reimburse Murphy pursuant to the court's inherent equitable and discretionary powers under the Civil Rights Act.

It must be emphasized that Murphy is seeking contribution and not indemnification from the unions. Contribution presupposes a common liability shared by two or more actors on a pro rata basis, while the right of indemnity shifts the entire loss upon one person by reason of some legal relationship which exists between two parties, one or both of whom is responsible by law to the injured party. See *Builders Supply Co.* v. *McCabe*, 366 Pa. 322, 77 A.2d 368 (S.Ct. Pa. 1951).

The International initially argues that Murphy's cross-claim for contribution is based solely on violations of the 25-pound weight limitation imposed on females in the warehouse by the 1965 and 1968 labor contracts and, as such, the claim for contribution is based upon a breach of contract. The International reasons that the claim for contribution must fail because no right of contribution exists in a breach of contract action. *Globe Indemnity Co.* v. *Agway, Inc.*, 456 F.2d 472, 475 (3d Cir. 1972). This contention is without merit. While the cross-claim is not a model of clarity, Murphy explained at trial the basis of its claim for contribution—i.e., common liability of the unions for the discrimination implemented pursuant to the 1965 and 1968 labor contracts. The claim for contribution cannot be construed as being based on a breach of contract claim. The discrimination which was practiced against the female employees resulted not from a breach of the labor contracts, but rather because the provisions of the contracts were complied with.

The International makes another argument: assuming *arguendo* that the violation of Title VII is a tort, it argues that Murphy is a tortfeasor primarily liable for the dis-

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monly liable with the company for the $100,000 of the settlement allocated as payment for any Equal Pay Act violations.

crimination and that it is only secondarily liable, and further that Pensylvania law prohibits a party primarily liable from recovering against a party secondarily liable. It is true that prior to the enactment of Pennsylvania's Uniform Contribution Among Joint Tortfeasors Act, 12 P.S. § 2083,[35] in 1951 such distinctions were recognized, see *Builders Supply Co.* v. *McCabe, supra;* however, the Act abolished such distinctions. Furthermore, even if these distinctions still existed, the difference in secondary and primary liability rests upon the character of the legal relationship between the parties. The claim for contribution here has nothing to do with a legal relationship between the company and the unions; it is based on the proposition that the International, Local 249, and Murphy are equally liable to plaintiffs for the unlawful employment practices and that the unions should share in the economic burden borne by Murphy in settling the plaintiffs' lawsuit.

The International and Local 249 also advance the argument that Murphy's alleged right of contribution cannot be based on Pennsylvania's Uniform Contribution Among Joint Tortfeasors Statute, 12 P.S. § 2083, because employment discrimination under the Civil Rights Act cannot be classified as a tort. *Howard* v. *Lockheed-Georgia Co.*, 372 F.Supp. 854, 858 (N.D. Ga. 1974).[36] This argument in turn

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[35] 12 P.S. § 2083 states:

(1) The right of contribution exists among joint tortfeasors; A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof; (3) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement. 1951, July 19, P.L. 1130, § 2.

[36] Howard, *supra* was an [indecipherable] for allegedly unlawful employment [indeciperhable] under the Civil Rights Act of 1871 [indecipherable] The case held that punitive damages are not [indecipherable] in Title VII actions.

rests on the proposition that Murphy must rely on some statutory authority to enforce a right of contribution since at common law, no right of contribution existed among joint tortfeasors. *Halcyon Lines* v. *Haenn Ship C. & R. Corp.*, 342 U.S. 282, 72 S.Ct. 277, 285, 96 L.Ed. 318 (1952); *Union Stock Yards Co.* v. *Chicago, B. & Q. R. Co.*, 196 U.S. 217, 224, 25 S.Ct. 226, 49 L.Ed. 453 (1905). The court need not decide whether the Pensylvania Act on contribution among joint tortfeasors applies to civil rights violations, because the inherent equitable powers of the court permit it to order contribution among those parties that are jointly liable for the violations of the Civil Rights Act. In suits in equity, federal district courts have wide latitude in fashioning remedies to fit the specific violations of the equal employment opportunity provisions of the Civil Rights Act.[37] *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Myers* v. *Gilman Paper Corp., supra;* Cf. *Louisiana* v. *United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709

And in the pertinent part of the opinion, the court found that the plaintiff had failed to state a claim under the Medical Care Recovery Act, 42 U.S.C. § 2651, *et seq.* The Act provides in part that in any case where the United States has provided medical care to a person who is injured as a result of circumstances which create a tort liability upon some third person, the United States shall be subrogated to the right of the injured person against the third person to the extent of the reasonable value of the care provided. The plaintiff, seeking relief on behalf of the United States, averred in the complaint that he had received medical care from the United States for injuries proximately caused by the unlawful discrimination. The court dismissed this claim, reasoning that an employment discrimination case brought under the civil rights laws was not a cause of action sounding in tort.

[37] In its brief, the International states that the only remedies available in a Title VII action are those which Congress has mandated by statute. This is a misstatement of the law. The equitable power of federal courts in remedying unlawful employment practices are necessarily broad to ensure that the purposes behind the Act will be advanced.

(1965).[38] Whether the cause of action provided for in the Civil Rights Act may be most appropriately characterized tortious, or equitable as originating in the Civil Rights Act itself, or by some other label, it is beyond dispute that Title VII gave the federal district courts a full panoply of equitable powers:

> It is . . . the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice,' Brown v. Swann, 10 Pet. 497, 503, 9 L Ed 508; see also Porter v. Warner Holding Co., 328 U.S. 395, 397-398, 90 L Ed 1332, 66 S Ct 1086. '[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.' Bell v. Hood, 327 U.S. 678, 684, 90 L Ed 939, 66 S Ct 773, 13 ALR2d 383.[39]

Albermarle Paper Co. v. Moody, 422 U.S. 405, 418, 95 S.Ct. 2362 45 L.Ed.2d 280 (1975).

Murphy's claim for contribution against the unions is not a novel one. At least three federal courts have recognized the right of an employer, accused by its employees of violating Title VII, to seek contribution from a union which has been alleged to have also participated in violating Title VII. Bowe v. Colgate-Palmolive Co., 272 F.Supp. 332, 358 (S.D. Ind. 1967),[40] *mod. on other grounds,* 416 F.2d

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[38] *Louisiana v. United States* held that a federal court's inherent equitable powers entitled it to retain jurisdiction over violations of the Voting Rights Act, 42 U.S.C. § 1971, *et seq.*, and to fashion appropriate remedies.

[39] In this case, the Supreme Court formulated rules regarding the award of back pay in Title VII cases where racial discrimination in employment is proved.

[40] In *Bowe,* although the district court recognized the right of an employer to seek contribution from a union for the discrimination suffered by female employees as a result of certain contractual provisions, the court entered judgment for the union because it

711 (7th Cir. 1969); Blanton v. Southern Bell Telephone & Telegraph Co., 49 F.R.D. 162, 163 (N.D. Ga. 1970);[41] Gilbert v. General Electric Co., 59 F.R.D. 267, 270 (E.D. Va. 1973).[42]

The Civil Rights Act specifically makes labor organizations liable for unlawful employment practices. 42 U.S.C. 2000e-2(c). To conclude that labor unions are liable together with an employer for violations of the Act is procedurally distinct yet substantively indistinguishable from the decisions of numerous federal courts which have found unions, both locals and internationals, and employers liable for discrimination and have proportionately assessed back pay awards among them. Myers v. Gilman Paper Corp., *supra;* Bush v. Lone Star Steel Co., 373 F.Supp. 526 (E.D. Tex. 1974); United States v. United States Steel Corp., 371

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found no factual basis for holding the union liable to the employer. On appeal, the United States Court of Appeals for the Seventh Circuit viewed the claim against the union as one brought under Title VII. Because the appellate court concluded that Title VII procedures were not complied with, the district court's dismissal of the claim was affirmed.

[41] In *Blanton,* an employer was accused by its employees and their union of violations of Title VII. Prior to the adjudication of this claim, the employer filed a "counterclaim" against the union alleging that the union was also liable to plaintiff-employees for its participation in the agreement which led up to the allegedly unlawful practices. The court, while expressing serious doubts about the employer's ultimate ability to prove a right to contribution, permitted the counter-claim to proceed and characterized it as "in the nature of a claim against a joint tortfeasor rather than a claim under the Civil Rights Act." 49 F.R.D. at 162.

[42] Under circumstances similar to the above two cases, the employer, General Electric, having been sued by its employees and their union for violation of Title VII, filed a counterclaim against the union seeking contribution and/or indemnification for the union's alleged participation in the claimed discrimination. Rejecting the union's motion to dismiss the counterclaim, the court stated that the counterclam could be brought either under theories of tort law or Title VII or both.

F.2d 1045 (N.D. Ala. 1973), *modified*, 520 F.2d 1043 (1975), *reh. and reh. en banc denied*, 545 F.2d 1214 (5th Cir. 1976).

As we have noted, the court has wide latitude in exercising its inherent equitable power under the Civil Rights Act. To adopt the unions' argument that a right of contribution cannot be enforced under the Act would frustrate the Act's goal of securing complete justice by whatever manner equity demands. Albermarle Paper Co. v. Moody, *supra*. Furthermore, the Supreme Court noted in *Albemarle* that where a violation of the Act is found, back pay normally should be awarded as a matter of course since it "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history,' United States v. N. L. Industries, 479 F.2d 354, 379." 422 U.S. at 417-418.

Prior to evaluating damages, one further procedural point on Murphy's claim for contribution must be addressed. The unions question whether, as in the present case when a settlement occurs before the plaintiffs have proven their original case at trial, the settling defendant can enforce its right to contribution from non-settling co-defendants. No federal law specifically covers this point. Pennsylvania law, however, permits the settling defendant to enforce a right of contribution against other non-settling defendants if three conditions are satisfied: (1) the defendant-wrongdoers are jointly and commonly liable to the injured plaintiffs; (2) the settling wrongdoer (Murphy) has discharged or extinguished the common liability of the wrongdoers to the plaintiffs; and (3) the settling wrongdoer shows that the amount of the settlement is reasonable. 12 P.S. § 2083(3): W. D. Rubright Co. v. International Harvester Co., 358 F.Supp. 1388, 1391-92 (W.D. Pa. 1973); Swartz v. Sunderland, 403 Pa. 222, 169 A.2d 289 (S.Ct. Pa. 1961). Since the right of contribution in Pennsylvania is founded upon principles of equity requiring wrongdoers to share liability for the wrong done by both of them, Puller

v. Puller, 380 Pa. 219, 110 A.2d 175 (S.Ct. Pa. 1955);[43] W. D. Rubright Co. v. International Harvester, *supra;* Brown v. Dickey, 397 Pa. 454, 155 A.2d 836 (S.Ct.Pa. 1959), the goals of the civil rights laws are consistent with these equitable principles and it is appropriate to look to the Pennsylvania criteria as a guide.

The first condition has been met, since the court has concluded that Local 249 and the International are jointly liable with Murphy for the violations of Title VII. The second criteria is satisfied because Murphy, pursuant to the terms of the consent decree, has paid out approximately $448,000 [44] to the plaintiff class for Title VII violations and by such payment has extinguished whatever claims that the plaintiffs had against the International and Local 249 under Title VII violations.

The International, in its brief, argues that the third condition—reasonableness of the settlement—has not been satisfied. In short, the International contends that the $100,000 allocated as payment for plaintiffs' Equal Pay Act claim was too low and conversely, the portion of the settlement covering Title VII violations was too high. The International asserts that Murphy's potential liability for violations of the Equal Pay Act was approximately $821,000.[45]

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[43] The right of contribution is not recovery for the tort, but rather it is the enforcement of an equitable duty to share liability for the wrong done by both.

[44] The $100,000 of the settlement which was allocated as payment for any Equal Pay Act claim violations is irrelevant to our discussion of Murphy's right of contribution against the unions since the court has determined that only Murphy, as an employer, and not the unions are liable under 29 U.S.C. § 206(d)(1).

[45] This assertion is based upon the International's apparent assumption that the figure of $821,413.67 contained in Murphy's Ex. 12 represents the company's potential Equal Pay Act liability. This appears to be a mistaken, or at least, a disputed fact. McGinley, the person who inserted the calculations on Ex. 12, according to company records, testified that these calculations do not include any figure or calculation with respect to the company's

On the other hand, Murphy's figures, according to one theory of calculation, show a potential liability of approximately $482,000 on the Title VII claim. The International argues that based on figures which purportedly show the potential liabilities of Murphy on each claim, the settlement should have been proportioned at approximately $2 for the Equal Pay Act claim for every dollar paid on the Title VII claim.

The International's objection must be rejected. On October 2, 1972, at the hearing held by this court on the consent decree, the International, on the record, stated that it had "no objection to the amount of the settlement and/or as to the determination of the legal fees . . ." while it, of course, reserved the right to challenge Murphy's claim for contribution (Tr. 11). At the hearing, Local 249 indicated that it was adopting the same position. Both of these unions had notice of every hearing and conference held by the court on the settlement procedures, and no objection of any kind was lodged. It is too late to raise such an objection.

It may be that Murphy, in allocating the amounts of the settlement, may have sensed the weakness of its claim that the unions were also liable for violations of the Equal Pay Act. However, the $100,000 allocated as payment for that claim cannot be described as unreasonable. The United States Department of Labor, which is responsible for overseeing enforcement of the Equal Pay Act has taken no exception to the amount. The $448,000 paid by Murphy for the Title VII claims is, of course, proportionately higher. However, it cannot be described as unreasonable since the potential liability of Murphy under Title VII was greater.

The settlement was reasonable.

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liability under the Equal Pay Act. (Tr. 167-68). The court may assume, for the purposes of considering the International's argument on the settlement's reasonableness, that the $821,000 represents Murphy's Equal Pay Act liability.

DAMAGES

The court now turns to an evaluation of the appropriate amounts which the International and Local 249 should contribute to Murphy. It is necessary to make several prefatory points prior to a detailed explanation of the procedures utilized by the court to arrive at these amounts.

In assessing damages, the court's polestar is equity. In this regard, the $100,000 portion of the settlement which was allocated as payment for the Equal Pay Act claim under 28 U.S.C. § 206(d)(1) is not relevant to our assessment of damages since only Murphy is liable under this statute. Murphy in its brief and at trial (Tr. 161-162) stated that it is seeking $316,263.10 from the International and $18,638.33 from Local 249. These figures reflect Murphy's contention that the unions are commonly liable with the company for the Equal Pay Act claim.

These amounts sought by Murphy also include interest which Murphy apparently paid to the plaintiffs for the convenience of disbursing the settlement money in deferred payments. Murphy has not presented any evidence as to the amount of interest paid, the portion of interest paid on the Equal Pay Act and Title VII claims respectively, nor which of the three payments made pursuant to the settlement were considered "deferred" The court will not include the interest in its evaluation of the amount of contribution since no authority has been cited to the court for this proposition and for the more practical reason that no calculations as to the portion of the total interest which accrued on the Title VII claim (as distinguished from Equal Pay Act claim) has been placed in evidence.

The International contends that certain amounts should be deducted from any back pay award entered against it. First, it argues that any unemployment compensation paid to the females during the time in issue should be subtracted from the calculation of the total wage loss to the female class members. Similarly, the International also states that a credit or deduction should be entered in the computation of the contribution awards for the hours where females

temporarily worked in higher rated job classifications, and for the hours of work performed by those female employees who were not a part of the class action. These deductions and credits are not relevant to the court's assessment of damages because, as Murphy's accountant explained, these deductions and credits would have been claimed if the company had gone to trial on the merits of plaintiffs' claims, and then defended the case on damages. Because the amounts under consideration were made to the plaintiffs by Murphy pursuant to a settlement and not pursuant to the court's judgment, these credits and deductions specified by the International are not relevant to the evaluation of the amounts which the unions should contribute to Murphy. Plaintiffs were paid pursuant to a compromise and not because of the court's computation of the class' actual damages.

Murphy's right of contribution cannot and need not be calculated according to the specific amount of its potential liability under Title VII. Both Murphy and the International have introduced a sheet of figures which are purported to be calculations of Murphy's total potential liability under Title VII of the Civil Rights Act. (Murphy Ex. 12, International Ex. R). Although both the parties have utilized the same company records as the basis for their calculations, they have computed a different figure for Murphy's potential Title VII liability. In fact, in Ex. 12, the company's potential liability for the discrimination has been calculated according to two different theories, one resulting in a total of approximately $482,000 and the other in an amount twice this first amount, or $821,000. McGinley, in direct contradiction to the International's assertions testified that he made no study to determine the correct amount of the company's potential Equal Pay Act liability; rather he said that the $100,000 allocated as payment for this claim was proposed to the Department of Labor without reference to any specific calculations (Tr. 167-68).[46] In short, there is no undisputed figure introduced

[46] In its brief, the International argued that the $821,000 figure

by the parties which reflects Murphy's total, potential liability under Title VII. However, according to the procedures the court utilizes to assess the amounts which the unions shall contribute, this information is unnecessary.

The amounts which the International and Local 249 shall contribute to Murphy will be calculated in proportion to the time that each union was acting as the unit's collective bargaining representative. Of the $548,000 paid by Murphy in the consent decree, the unions are commonly liable with Murphy for the $448,000 paid for Title VII violations since $100,000 was allocated as payment for the Equal Pay Act claim. The unions are collectively liable for 50% of $448,000, or $224,000. The union's share in turn must be equitably proportioned between Local 249 and the International. The settlement spanned the period from July 1, 1965 to June 30, 1971, or six years. Local 249's liability is limited to five months (February 1 to June 30, 1971) of this six-year or seventy-two month period. Therefore, Local 249's share is 5/72 of the unions' total share or $15,556 (5/72 x $224,000), and the difference between Local 249's share and the total union liability is the International's share, or $208,444 ($224,000 −$15,556).[47]

The $100,000 of attorney's fees paid pursuant to the settlement must be similarly proportioned to each party's share of liability.[48] Initially, the court must determine what

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represented the company's Equal Pay Act liability. And in Exhibit "T," the International, purportedly on the basis of McGinley's and the company's records, has calculated the company's potential "Equal Pay—Equal Work Claims" liability.

[47] This method of computation assumes, of course, that during any given month during the six-year period, the liability was equal to that of any other month. Actually, this is not the case. Again, the court need not calculate the actual monthly damages since the object of our damage evaluation is to equitably proportion the consent decree, which was also not founded on actual liability.

[48] The court has discretionary authority pursuant to 42 U.S.C. § 2000e-5(k) to order a pro rata sharing of the attorney's fees on Murphy's claim for contribution.

portion of the attorney's fees represents payment for the Equal Pay Act claim, since only Murphy is liable under this theory. The Title VII portion may be determined by a simple ratio

$$\frac{\text{(Title VII settlement}}{\text{(total settlement}} = \frac{\text{Title VII fees)}}{\text{Total fees)}}$$

and by substituting the appropriate figures, the attorney's fees which correspond to the Title VII portion of the settlement are $81,752. The unions' collective share is 50% of this amount, or $40,876; Murphy's total responsibility for attorney's fees is the difference between the total amount of attorney's fees awarded in the consent decree ($100,000) and the unions' share fees ($40,876), or $59,124. This amount includes the proportion of attorney's fees on the Equal Pay Act claim. By utilization of an analogous ratio, Local 249's and the International's share of the attorney's fees may be determined proportionately to their share of the contribution claim: Local 249's share is $2,837, and the International's share is $38,039. One more factor must be credited to the International's share of the contribution judgment: the $4,146 paid by Local 940 to Murphy in a settlement prior to trial.[49] This amount must be deducted from the International's share of the contribution claim.

In summary, the court finds that Murphy has a right of contribution against the International for $242,237, and against Local 249 for $18,393. Murphy has settled its claim for contribution against Local 940 for $4,146. Murphy must therefore bear the burden for the payment of $378,978 of the consent decree.

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[49] The International, on the record, stated that it had no objection to this settlement since the settlement did not require Local 940 to admit to any liability. It should be noted that the evidence shows that Local 940, along with the International and Murphy, was also liable for the discrimination in the 1965 and 1968 labor contracts. Theoretically, if Local 940 had not settled with Murphy, it would have been liable for an appropriate share of the contribution claim.

ORDER

SCALERA, J.

April 29, 1976

It is hereby ordered and decreed that:

Judgment be entered in favor of the G. C. Murphy Company and against the International Retail, Wholesale & Department Store Union in the sum of $242,337; and

Judgment be entered in favor of the G. C. Murphy Company and against General Teamsters, Chauffeurs and Helpers Local Union No. 249 in the sum of $18,393.

RALPH F. SCALERA
United States District Judge